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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 70

IRVING J. WOLF, ET AL., PETITIONERS,

vs.

ARNOLD A. WEINSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1962
CERTIORARI GRANTED APRIL 2, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1417] RUTH SPIELHOLZ, one of the claimants herein, called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rosen:

• • • • • • •

[fol. 1418] Q. Of the debtor's stock.

A. Mr. Malakoff was a friend of the family for many years and in September, 1951 I met him, my husband and myself, at my sister's house, and he was there with his sister.

Q. What is his sister's name?

A. Gertrude Klein; and at that time he spoke about this Nazareth.

[fol. 1419] Q. What did he say to you?

A. Well, he spoke—he told my husband that he thought it was—that he would get a good return for his money, that he would get a good return if he should make an investment in the Nazareth Corporation.

Q. And did you agree to make an investment?

A. Well, not right then and there, no. My husband and I talked it over, and I think about a week or two later we sent him $1200.

• • • • • • •

[fol. 1446] ROSE KAPLAN, called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rosen:

• • • • • • •

[fol. 1448] A. And in the course of conversation my husband talked to Mr. Malakoff and he suggested to buy stock in Nazareth.

• • • • • • •

[fol. 1457] MORTON SAMET, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rosen:

• • • • • • •

[fol. 1461] Q. Was there any conversation relating to the investment?

A. Yes.

Q. Or was this money merely given to Malakoff as a loan?

A. Well, he spoke about some situation in Pennsylvania, farmers market. I even went down and visited the Farmers Market with him and his son—and I guess that was all—his daughter, son-in-law and daughter.

Q. So when you speak of an investment, you speak of an investment in Pennsylvania of a farmers market, and you are exhibiting two checks which you claim are for this particular investment?

A. Yes, sir.

Mr. Rosen: Debtor offers in evidence check dated April —I withdraw that—check dated March 14, 1951.

The Court: You didn't mean to say "debtor"? You meant to say "claimant", didn't you?

Mr. Rosen: Claimant. You are right, claimant, please, check dated March 14, 1951, to the order of John Malakoff [fol. 1462] for $1,500, drawn on the First Freeport Bank, signed by Morton Samet, and check dated April 10, 1951, to the order of Mr. John Malakoff for $500, same bank, signed by Morton Samet, as the check for $1,500. There are signatures on the reverse side, or what purport to be the signatures, of John Malakoff, John Malakoff, Agent—I am sorry, "Off Agent"—"Off" period "agent." Similarly on the $500 check.

(Marked Claimant's Exhibit 2 in evidence in the Samet matter.)

• • • • • • •

A. I received a letter and also certificate. This certificate, unfortunately, was mislaid or lost, but I have the letter. The certificate was for two shares.

• • • • • • •

[fol. 1463] Q. Did you receive any income or profits from John Malakoff on this $2,000 transaction?

A. Yes, sir, I did.

Q. What did you receive?

A. Approximately—I don't know the exact amount of [fol. 1464] money, but approximately 17 or 18 checks $33-and-some-odd-cents.

Q. I show you a series of checks, commencing with September 1, 1951, to May 1, 1953, totaling 18 in number, each in the sum of $33.34, and ask you whether you received them on the transaction in question?

A. Yes, sir.

Q. Does your endorsement appear on the reverse side of each of those checks?

A. Yes, sir.

Q. Those checks appear to be signed by John Malakoff, John Malakoff, Agent, and John Malakoff, Special, is that correct?

A. Yes, that is correct.

• • • • • • •

[fol. 1465] Q. Did you agree to take $2,400 in cash for your $2,000 investment with John Malakoff?

A. No, sir. There is something to the effect on that letter, that I had no idea the meaning of, and I still to this day don't know the meaning of it.

Q. Did you agree to take $2,700, October 12th, four months from the time you gave him the $2,000? In other words, take $2,700 for the $2,000?

A. No, sir.

• • • • • • •

[fol. 1472] Q. Didn't you have an arrangement with Mr. Malakoff how much he was to pay you each week or each month on each of these loans of $1,460?

A. Yes. I have forgotten the amount though.

Q. What was the rate?

A. I don't know whether it is 18 per cent or 16 per cent, but in there, in that vicinity.

• • • • • • •

[fol. 1476] Mr. Rosen: I offer in evidence the following checks on behalf of debtor:

Check dated February 27, 1952, on the Freeport Bank, to the order of John Malakoff, in the sum of $1,000, signed by Morton Samet. On the reverse side, Re Hotel Margaret. 64 So. Grove Street, Freeport, New York, John Malakoff, John Malakoff, Agent.

• • • • • • •

[fol. 1479] The Court: You asked him to read the letter.

The Witness: You did.

Mr. Rosen: All right, he can read it.

The Witness: Want me to read the letter?

Mr. Rosen: Go right ahead.

The Witness: "June 12, 1952.

"Morty Sameth:

"It is understood that you have invested in the sum of $2,000 which is a part share (1/32nd) in a deal, which is known as Nazareth Market. Purchase price was $85,000. Mortgage," I think it is, "$18,000. Now, all you have to do is take profits.

"Jack."

In the lefthand corner is "$2,400 cash, $2,700 October 12 (four months). What would you take? It's an excellent deal.

"Jack."

• • • • • • •

Q. Purportedly, as you read this, on October 12, 1952, [fol. 1480] Mr. Malakoff was to give you $2,700?

A. That is not a fact.

Q. On that $2,000?

A. No, sir, because I got the 33.33 checks after this, even after October 12th. So it is impossible for me to get $2,700 plus the 33.33. I have no understanding what that means. You are just speculating or guessing.

• • • • • • •

Q. Kindly be responsive. But you at no time objected to Mr. Malakoff, by letter, or by phone, or by conversation, [fol. 1481] as to these memos on the bottom of Claimant Samet's Exhibit 3, $2,700, October 12th, four months?

A. No, sir.

• • • • • • •

[fol. 1501] Cross examination.

By Mr. Seligson:

Q. So those two checks refer to returns on an investment you made with Mr. Malakoff in the Hotel Margaret; is that your testimony?

A. Part of it, I guess. I don't recall precisely now. I am trying to search and help you, but I know those two checks must be because of what it says on the back. They aren't in my handwriting, incidentally.

• • • • • • •

[fol. 1503] Q. Dr. Samet, will you look at these four checks you have produced, each for $16.67, and tell us whether these aren't additional checks you got in connection with the Hotel Margaret?

A. Yes, sir, they are.

• • • • • • •

[fol. 1527] Q. Did you get a return of 20 per cent on your money with respect to all of the moneys which you advanced to Mr. Malakoff?

A. I don't believe I did, no, sir.

Q. I show you these checks, each for $16.67, signed by John Malakoff, Special, and payable to the order of M. Samet, and ask you whether you got these moneys?

[fol. 1528] A. Yes, sir.

Q. Did you get those moneys in connection with the moneys you advanced to John Malakoff on the Hotel Margaret?

A. I don't recall specifically except one of these things is marked that. I don't recall in what regard I got these.

• • • • • • •

[fol. 1548] Direct examination of
Cydney Grossman.

By Mr. Rosen:

Q. And is that based on an understanding that you were to get 20 per cent income on an investment of $2,000?

A. Yes, sir.

• • • • • • •

[fol. 1557] Direct examination of
Mrs. Mae Bluestone.

By Mr. Weiswasser:

Q. Will you tell us just what he did say.

A. Well, he said, "The dividends will be 20 per cent and it will be $1,000 a share and that it is a wonderful thing, and that he thinks it is going to be a grand thing and one of the best things he had. And he said—well, I hesitated, and then he said, "Look at these people sitting outside. They have been investing with me for years." Some man was sitting in the outer office, and that's all, and he told me—

• • • • • • •

[fol. 1660] Cross examination of
H. Lawrence Laupheimer.

By Mr. Robbins:

Q. Is that correct?
A. Yes, that's correct.
Q. Did he request the return of that note?
A. No, he did not.
Q. Did he ever request the return of that note?
A. No, he never did. In fact, he told me, when he gave me that legal sheet that I signed, that he would ask for that back when I got my stock certificate, and I didn't, and I forgot it. In fact, it was just on this old feeling—and, if it means anything—he told me at one time that he didn't need to ask for things back from people. "You [fol. 1661] don't have to write anything. My work is done on my bond; my honor is my bond and my hand shake."

• • • • • • •

[fol. 1695] Dorothy Holober Clark, called as a witness in her own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rosen:

• • • • • • •

[fol. 1697] The Witness: That was early in 1951.

A. (Continuing) And shortly after that Mr. Malakoff asked me if I would like to buy some shares in Nazareth Farmers Market, and I told him that I didn't have any cash available but that I was interested, and I would like to own 3 shares if I could pay it off, and he consented. I don't remember who was present exactly at that time.

• • • • • • •

[fol. 1731] Q. Did you sign any other papers or memoranda, if you recollect, other than the stock certificate in so far as this transaction was concerned?

A. I signed a paper. I can't remember exactly how it read but it was to the effect that Mr. Weinstein didn't think I should sell this stock because it was good and that I should hold on to it and that I was aware of that fact.

. . . . . .

[fol. 1738] Cross examination.

By Mr. Weinstein:

Q. Now then, Mrs. Clark, in the initiation of this transaction leading up to the sale by you of one of your three shares of your Nazareth stock, would you please tell the Court who approached whom, whether I approached you or whether you approached me, for the purpose of selling this stock?

A. Well, I approached you because I had received, or, [fol. 1739] I should say, we had, not myself alone, we had received an offer to buy our stock from some other people and I didn't know who the people were that wanted to buy it. We were approached by an attorney named Buchwald, and so we decided then—or I think he offered us eight or nine hundred dollars a share, or something like that, and we didn't want to sell for that, and so then we got—we called you, and I was the one who asked you to sell that share for me, or rather three of them at the beginning, and one later.

. . . . . .

[fol. 1752] Cross examination of
Robert A. Noire.

By Mr. Rosen:

Q. Do you know what capital stock of a corporation is?

A. Well, I tell you the truth, Helen Bernstein told me this is a stock from Nazareth Corporation, and that is a stock. I never bought stock before. I just came to this country; was saving this hard money. I bought this stock. I didn't ask whether capital or any kind. I bought a stock.

Q. But your understanding was then that you were buying the stock of the corporation, original issue?

A. Yes.

Q. Direct from the corporation?
A. Yes.
Q. In other words, your understanding was not that you were buying stock that was issued first to John Malakoff and then bought by you?
[fol. 1753] A. No.

• • • • • • •

[fol. 1844] Direct examination of
Lazar Karapontso.

By Mr. Rosen:

A. November 10, 1952. Offhand I wouldn't remember exactly what Mr. Malakoff said outside of praising the Market, saying it was a good deal to get in on, and tell me about the 20 per cent on each share. It was $1,000 a share.

• • • • • • •

[fol. 1846] Q. Have you that stock certificate with you?
A. Yes. And he also wrote on the back of it.

Mr. Rosen: The witness specifies, "This represents 2 $1,000 shares, $2,000. You will receive a 20 per cent dividend per annum payable in equal monthly payments of $33.34 on the first day of each month."

• • • • • • •

[fol. 1890] Direct examination of
Ernest Pollak.

By Mr. Robbins:

Q. What were you to receive for those two checks, Mr. Pollak?
A. Nine shares.
Q. Of what?
A. Of the Nazareth Farmers Market.

• • • • • • •

[fol. 1987] Direct examination of Charles Kanter.

By the Court:

Q. Excuse me, just a moment, Mr. Witness. There was a time when you and Eddie Malakoff and John Malakoff and Mr. Mintz and two other people were in Malakoff's office, right?

A. Yes, sir.

Q. It was a morning?

A. Yes.

Q. Some time in 1951?

A. Yes, sir.

Q. Can you recall the season of the year? Was it in the winter, summer?

A. I think it was in the summer.

• • • • • • •

[fol. 1988] Q. Eddie Malakoff said something. What was it?

A. That he has a quarter of a Market in Pennsylvania for sale for $16,000.

Q. Yes?

A. And there was four of us decided to go in. I said, "I'll take a quarter of the quarter," and I put up $4,000.

• • • • • • •

[fol. 1991] Q. Tell us what happened on that occasion, what was said and what was done.

A. Accepted, that we decided to take the quarter of the Market.

Q. When you say "we" is it only the four or the whole—or John Malakoff also?

A. The four.

Q. All right.

A. But I want to bring out, John Malakoff became a partner. He gets a certain part of our profits when we sell. That was all the arrangements with Malakoff.

Q. What was said at that meeting after you returned from the Market, when you six people were in John Malakoff's office?

A. We decided to take the quarter of the Market.

Q. What was done?

A. We put up the $16,000.

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[fol. 1993] Q. But I understood you to say that John Malakoff had a contingent interest, a share in the profits, if you sold your $16,000 interest?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. When and where and by virtue of what words did that arrangement arrive?

A. Just by words.

Q. When?

A. At the time when we bought the Market.

Q. That day that you put up the cash?

A. That day they put up the cash.

Q. What was said that led you to believe that that was the arrangement? Who said what?

A. John Malakoff said that, "You know the way I go in a deal, that I get"—I don't recall, I think it was—"10 per cent of the profit which is being made on the share at the time if and when it is sold."

• • • • • • •

[fol. 2027] Q. I want you to come here and trace for me penny for penny—

A. All right.

Q. —every deal that you had with John Malakoff from the beginning to the end, if we stay here until Christmas.

A. All right, sir.

Q. You can't come in here and just chalk off $1,300 and say that it probably was profit on some other deal. We do not do business that way here. I want an accounting, penny for penny.

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[fol. 2219] Cross examination of
Richard S. Hull.

By Mr. Rosen:

Q. Did you handle any legal documents for the sale of the stock of the corporation?

A. No. For the sale of the stock?

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Q. Yes.

A. No.

Q. Did you prepare any contracts involving the sale of the stock of Nazareth Fair Grounds & Farmers Market, [fol. 2220] Inc.?

A. Just the one between Mr. Robbins and myself but not before—but not while John Malakoff was alive.

Q. Were you acting as attorney in any of the deals prior to the reorganization of Nazareth Fair Grounds & Farmers Market, Inc. in the sale or transfer of the stock of Nazareth Fair Grounds Farmers Market, Inc.?

A. Now wait a minute. Let me amend that. There were two cases, but that rose out of different situations that I remember.

There was Kanter's case. He had an interest in the Margaret Hotel and I drew up an agreement with reference to that, where there was a transfer. Mr. Malakoff agreed to transfer stock to him, and I think I did the same thing with the Dancigers on some property in Roslyn, where I was the attorney on the Roslyn property and I was the attorney on the Margaret Hotel, but not as attorney for Nazareth.

Q. You drew up the contracts involving the sale or transfer of stock—

A. It was not a sale, it was a transfer of interest from one corporation to another.

Q. So you did draw contracts involving the sale and [fol. 2221] transfer of stock of Nazareth, is that correct?

A. That is correct.

* * * * * * *

[fol. 2255] Cross examination.

By Mr. Weinstein:

Q. Did you ask Mr. Malakoff what you were going to get for your $3,600 or whatever it was you were going to give him?

A. Yes. He said he wasn't sure whether it was going to be set up as a partnership, or a limited partnership, or a corporation. That would be determined later.

* * * * * * *

[fol. 2321] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Rosen: If your Honor pleases, this is an application by the debtor for authorization to enter into a lease which is expiring at the end of this month. In place of the Rehrig lease—the Rehrig lease, your Honor is expiring—we have a new tenant at a much higher rental, your Honor, and the debtor merely makes this application, your Honor.

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[fol. 2324] Mr. Robbins: Your Honor, Mr. Rehrig bought his business from Mr. Drucker four years ago and at that time he bought his business there was an agreement signed [fol. 2325] that contained a restrictive covenant. Mr. Drucker said he would not go into business in the market for a period of five years. There is still one year to run on that.

Now, our feeling on this matter essentially is that Mr. Drucker is the principal or one of the principals involved in this new lease that is being proposed by the debtor.

The Court: Have you got proof?

Mr. Robbins: Your Honor—

The Court: I am not interested in your feelings. You want to equal this lease? You want to match it?

Mr. Robbins: Your Honor—

The Court: Yes or no? Do you want to match this lease?

Mr. Robbins: Your Honor, I don't consider that a fair offer. What I am trying to say is that this payment—

The Court: I am cutting you off. You will have all the opportunity you want to say whatever you want, but I am asking you now first, regardless of the reason,—

Mr. Robbins: Yes.

[fol. 2326] The Court: Do you want to match the lease? Yes or no?

Mr. Robbins: At fifteen thousand, your Honor?

The Court: Yes.

Mr. Robbins: Your Honor, my client will match the lease in order to stay there.

The Court: All right.

Mr. Robbins: But what I am trying to say, your Honor, is that I honestly believe—I will give you the facts in a

moment—that this $15,000 for a one-year lease—I know only about the Brill lease; I have received no papers on Delphino.

The Court: It is the same lease. It will be executed by Brill and Delphino and they will put up $2500, two months security.

Mr. Robbins: Your Honor, I understand that. My position on this is that the $15,000 does not represent all rent. What it represents in part is a payment to the corporation for putting Rehrig out and putting Drucker back in.

The Court: I don't care. Rehrig has no vested right. His lease comes to an end on August 31 and I am going to get the best lease I can for that spot. I am not interested [fol. 2327] in your fights among yourselves.

Mr. Robbins: Your Honor, that is quite true. There isn't any dispute but that the corporation, the debtor, ought to get the best rent possible.

The Court: Exactly, and we have got an offer here of $15,000 with two months collateral, a one-year lease with a two-year renewal clause and I am saying to your man he should be given consideration if he is prepared to accept equal terms.

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[fol. 2329] Mr. Rosen: I understand this is a heavy day for him and Mr. Brill is working presently, true, for Drucker, Judge. He works for him; there is no question about it. But Brill says, "I don't care if the Judge feels I am not entitled to it or anything he asks; let Delphino take the lease. My feeling is if Delphino wants it either we go in jointly or if Delphino wants let him take it himself and I will work for him."

In other words, "I have no connection"—

The Court: Do you claim there is any connection between Delphino and Drucker?

[fol. 2330] Mr. Robbins: Well, there is through Brill, your Honor. That is our position on it. Drucker and Brill are brothers-in-law.

The Court: Excuse me just a minute.

Mr. Rehrig, are you prepared to pay $15,000 a year with two months security for that space which you are in now?

Mr. Rehrig: Yes, sir.

The Court: You are?

Mr. Rehrig: Yes, sir.

The Court: All right, I will favor the present tenant. You got the same lease.

• • • • • • •

[fol. 2332] The Court: No, because if they are going to come in with proof that there is a connection between Brill vis-a-vis Delphino and Drucker and what aspect that may have on the lease I don't know. They say there is a viola-
[fol. 2333] tion, that this is a subterfuge to violate a restrictive covenant between Drucker and Rehrig. I don't know. I am not going to get into all of this now because if you fellows have any sense before the 12th you will enter into a lease at $15,000 a year with $2500, two months rent, security, between Rehrig and Nazareth.

Mr. Rosen: I know, Judge. If he is ready to accept it we are ready, too.

The Court: Well, he says he is ready to accept it and I am stating now that it will be identically the lease proposed here without any provisions or any alterations, improvements or anything else. You are to get no more than Delphino or Brill or both of them would have gotten under this lease.

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[fol. 2337] The Court: You are not going to use the Court as a bargaining proposition and get somebody else to come in now and offer 20. You should have done that before. You have got to deal in fairness with the people that are in.
[fol. 2338] They have come up to the fifteen thousand, they have matched it, they have agreed to put up two months security, they ask for no better terms than those in the lease you have submitted to the Court; I will not entertain these further applications. So don't go looking for bargains.

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[fol. 2339a] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 2409] Direct examination of
Charles Kanter, resumed.

By Mr. Robbins:

Q. Did you get any money back, Mr. Kantor, on this East 3rd Street deal? I call your attention to your checkbook entry for August 16, 1951, that is, in Exhibit 22.

A. It says, "J. Malakoff, $500, East 3rd Street, New York City," check back for $500.

• • • • • • • •

[fol. 2413] A. 19, yes. It says "$500 check," it has a notation there, "Maywood, $500."

Q. In other words, the checkbook indicates you received two checks from John Malakoff, one on July 12, 1951, the other September 19, 1951, aggregating $975?

A. Yes, sir.

Q. $475 plus $500?

A. Yes.

• • • • • • • •

[fol. 2416] A. I gave a—we were buying a leasehold—we, I mean, Malakoff and myself—were buying a leasehold of the Margaret Hotel in Brooklyn, and I gave him a check to his attorney, made out to his attorney, Richard Hull, a certified check of $7,000, when they went to sign the contract.

Q. This was an investment in this Hotel Margaret at leasehold, you say?

A. That is correct.

• • • • • • • •

[fol. 2417] Q. Anything further on the Hotel Margaret?

A. Yes, on June 16, 1952 I made out a check to the New York Telephone Company for $1,000 as a deposit on the telephone for the Margaret Hotel.

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[fol. 2418] Q. Was there any more money given to John Malakoff on this Hotel Margaret deal?

A. Yes, sir, on July 10, 1952 I gave him a check for $2,000, made out to the Ambassador Estates and that was for—they were—

Q. Is that the check?

Mr. Rosen: I would like him to complete the answer.

A. Yes. They were short money at that time. We needed additional money. Decorated the lobby, and we were making additional repairs in the building, and we put up additional money for the repairs, and I gave him a check for $2,000.

• • • • • • •

[fol. 2426] Q. All right. What did you say to him and what did Mr. Malakoff say?

A. Mr. Malakoff said that he has some people who are interested that he can sell my share in the hotel, in the Margaret Hotel, if I was willing to exchange my interest in the Margaret Hotel for shares at the Nazareth Market.

Q. Did he identify those people?

A. Well, as far as I could think of, there was one party in there, working at the hotel, I don't recall his name, I [fol. 2427] don't know his name, and there was also another party there at the time, I think was Jerry Fried's brother.

Q. Julius Fried?

A. I don't recall his first name.

Q. Did Mr. Malakoff tell you that these two gentlemen wanted to buy an interest in the Hotel Margaret?

A. He did not tell me that but when I went to the Market—the Market—rather, when I went to the hotel, to check there once in a while, I met those two parties in there, in the hotel, and they told me that he promised them to give them some of my share into that hotel.

Q. Mr. Malakoff did not identify those people as the people who wanted your interest in the Margaret Hotel?

A. He did not.

Q. What else did Mr. Malakoff say about the Margaret Hotel at this meeting in April?

A. At this meeting in April he asked me if I would exchange my interest from the hotel to the Market, and I said I would.

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[fol. 2433] Q. The other certificate, comprising Exhibit 12, certificate No. 71 for eight shares, what did you give John Malakoff for that?

A. I gave him $4,800, which it was—he owed to me on [fol. 2434] the Wales Hotel. It didn't go through on the sale at that time and on January 15, 1952 I requested he give me some kind of receipt, and he issued this receipt to me that "I now, in the course of this arrangement"—"In the course of my management of the market, I may cause to be issued to you 20 shares of my present stock holdings."

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[fol. 2458] Cross examination.

By Mr. Rosen:

Q. And your statement that you didn't give him anything except what you got records of, that was a true statement when you made it?

A. Literally.

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[fol. 2519] Q. Then at no time, and until the time you purportedly claim you made a transfer of stock, of Ambassador stock, into Nazareth stock did you receive one cent on your Ambassador deal, is that correct?

A. That is correct.

• • • • • • •

[fol. 2520] Q. Mr. Kanter, did you go to John Malakoff and tell him you weren't satisfied that Ambassador was making money and that they were going to increase their expense by hiring a Mr. Fried as manager and that under the circumstances you wanted to get out of the deal and exchange the deal for something else?

A. I don't recall.

Q. You don't recall what you testified to on an examination in July 1958, sir?

A. I do not.

Q. Did you ever testify you were not satisfied with the management?

Mr. Robbins: Page number?

A. Mr. Rosen—

Mr. Rosen: I will come to that.

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[fol. 2521] Q. On page 55 of the examination:

"Did you have a discussion with Malakoff in April 1953 regarding the Ambassador Estates, its mismanagement and so forth?

"A mismanagement? No, I wasn't satisfied with the management; yes."

A. That is correct. That is my answer.

Q. Isn't it a fact you made your trade with Malakoff of Ambassador stock for Nazareth stock because the investment wasn't making any money and he was going to put in a new manager so there would be further loss of money and additional expenses?

A. I did not so testify.

The Court: He didn't ask you whether you testified to that. He asked you whether that is the fact.

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[fol. 2712] Direct examination of
Seymour Forman.

By Mr. Patur:

Mr. Patur: May I explain it this way? I think I am not speaking out of turn when I give the following short resume of the facts here: A loan was made by the claimant to a corporation known as Ambassador Estates, a $5000 loan; another $5000 loan was made to Wales Properties by this claimant; then a $5000 loan was made to the debtor corporation by this claimant, and at the time that the loan to the debtor corporation was made, the two previous loans on two other corporations were renewed at the same time, and an agreement was drawn up by John Malakoff wherein he stated that he gives to Seymour Forman as col-
[fol. 2713] lateral security 15 shares of the debtor corpora-

tion stock for the three $5000 loans which I have mentioned, which stock is to be returned in the event these indebtednesses are paid. If not, the shares of stock are to belong to the claimant as collateral security.

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[fol. 2718] Q. Now, Mr. Forman, on that same day, March 12, 1953, did you lend to Nazareth Fair Grounds & Farmers Market, Inc., the debtor, the sum of $5000?

Mr. Rosen: If your Honor please, I object to the form of the question.

A. I did.

Mr. Rosen: And I ask that the transaction—

The Court: Sustained. It is leading.

Q. When you met Mr. Malakoff on March 12, 1953, will you tell us what transaction you had with him on that day in relation to the debtor corporation?

A. Only to the debtor corporation? Only to that? He asked me for a loan of $5000 for the corporation and I gave him a check and he gave me a note for it.

Q. We are talking about the Nazareth Fair Grounds & Farmers Market transaction, Mr. Forman. Did you—

[fol. 2719] Mr. Rosen: I am sorry, Judge. I am really sorry. Could I hear the answer? I missed one word.

(Record read.)

Q. I show you this note, Mr. Forman, and I ask you whether that is the note which you received from the debtor corporation through Mr. John Malakoff?

A. Yes, this is the note, yes.

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Q. Mr. Forman, what form or how was this $5000 that you gave to Mr. Malakoff made up? How was it constituted?

A. First of all he demanded cash. He needed the cash to make good certain dividend checks that he had made

[fol. 2720] out. That is his explanation. I went to the bank and I drew out $1900 on one check; cashed it.

Q. What bank was that, Mr. Forman?

A. That was the Marine Midland Bank. And at that time I had cash that I had collected on other real estate projects, and whatever cash I had minus the bonus that he gave me—

Q. Tell us first, how much more cash did you have in addition to the 1900?

A. That was 1600.

Q. 1600? That makes 3500?

A. That is right.

Q. How was the other $1500 made up?

A. Well, he had told me that in order to extend the other two transactions, which would be—

Q. Which other two transactions?

A. Ambassador Estates—

Q. The Ambassador Estates transaction?

A. —and Wales Properties, Inc., and $500 that he would give me as a bonus on this transaction made up the other $1500; that I should bring only altogether $3500.

Q. Let us get this clear: This $1900 check, which you [fol. 2721] cashed, on the Marine Midland Trust Company, $1600 in cash which you had makes $3500, and then Mr. Malakoff gave you $500 bonus on the Nazareth loan and a $500 bonus on the Ambassador extension and the Wales extension—

A. Wales extension.

Q. —is that it?

A. That is correct.

Q. That made up the $5000?

A. That is right.

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[fol. 2740] Q. Now, Mr. Forman, coming back to the loan that you testified about to Ambassador Estates, Inc., do you remember when that loan was made by you to Ambassador Estates, Inc.?

A. That was made on August 28, 1952.

Q. And at that time did you give to Ambassador Estates, Inc. your check for $5000?

A. Let me see it.

(Check handed to witness.)

A. Yes, this is the check.

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[fol. 2742] Mr. Patur: The point is this, if your Honor please: This witness testified before that on March 12th he renewed a loan to Ambassador Estates and renewed a loan to Wales Properties.

The Court: Yes.

Mr. Patur: At that time—well, I don't think it is fair of me to testify, but I am trying to get out of this witness the mechanics that were used at the time.

Mr. Rosen: He has already testified.

Mr. Seligson: Doesn't that note say when it is due?

Mr. Patur: This statement tells us when it is due but that is not the note that Mr. Forman received on August 28th.

The Court: We will come to that. Do you want to offer it now?

Mr. Patur: Yes, I want to offer that in evidence.

Mr. Rosen: Same objections, if your Honor pleases, as those previously made.

The Court: Overruled.

(Marked Claimant's Exhibit 11 in the Forman claim.)

[fol. 2743] The Court: Now, I take it that the bank's advice, appended hereto, that on July 1, 1953 the note of August 28, 1952 was returned by the Corn Exchange Bank, and marked "insufficient funds," is not being offered now as part of this exhibit but that you will develop that with proper testimony?

Mr. Rosen: Your Honor, we will concede that it was returned by the bank and save time.

The Court: All right, fine. Then all of the papers making up Claimant's Exhibit 11 in the Forman claim, i.e., the note itself, the green Corn Exchange Bank advice of return, and the notice of the Marine Midland dated July 6, 1953, are in and constitute Claimant's Exhibit 11.

Q. Now, Mr. Forman, would you tell us on what date this Claimant's Exhibit 11, which is dated August 28th,

on what date did you actually receive it from Mr. John Malakoff?

A. I received this on March 12, 1953.

Q. On August 28, 1952, did you receive a promissory note from Mr. Malakoff at the time that you made the loan to Ambassador Estates?

A. Yes, I did.

Q. And what happened to that promissory note?

[fol. 2744] A. That was destroyed and a new one given to me on March 12, 1953.

The Court: The new one being Claimant's Exhibit 11, is that correct?

The Witness: Sir?

The Court: The new one being that note that counsel holds in his hand, Claimant's Exhibit 11?

The Witness: Yes, sir.

The Court: Let me ask you this question: You did receive a predecessor or prior note on August 28, 1952?

The Witness: Yes, sir.

The Court: Was that for $5000?

The Witness: $5000.

The Court: And when was it due, Mr. Forman, do you recall?

The Witness: It was due March 12th.

The Court: On the due date what did you do with it?

The Witness: I presented it to Mr. Malakoff for payment and he said he could not pay it at that time.

The Court: All right. And what did he do with it?

The Witness: He destroyed the original.

[fol. 2745] The Court: He tore it up?

The Witness: Tore it up and gave me this one and marked the original date, the time of the original date of the loan.

Direct examination.

By the Court:

Q. When you gave Malakoff or Ambassador Estates the $5000 check on August 28, 1952, did you receive any bonus or any part of it back?

A. I received a bonus at that time.
Q. From whom?
A. From Mr. Malakoff.
Q. Of how much?
A. If I can remember, about $250.
Q. In what form?
A. In cash.
Q. So that when you gave him the $5000 check marked Claimant's Exhibit 10 in the Seymour Forman claim he gave you back $250 in cash?
A. Yes, sir.

The Court: All right.

Direct examination.

By Mr. Patur:

Q. Now, Mr. Forman, on the same day, August 28, 1952, did you also lend to Wales Properties, Inc. $5000?
A. I did. Yes, I did.
[fol. 2746] Q. I show you this check and ask you whether that is the check which you delivered to John Malakoff as president of Wales Properties, Inc.?
A. He wrote it out; it is his handwriting; yes.

Mr. Patur: I offer it in evidence.
Mr. Rosen: Your Honor, may I have a standing objection on all of these documents that haven't got Nazareth's name on it at all, Malakoff as president, on the grounds previously stated on the admission of this type of document?
The Court: You may, and it is overruled.

(Marked Claimant S. Forman Exhibit 12 in evidence.)

Q. And did you receive from Wales Properties, Inc. this promissory note August 28, 1952, from Mr. Malakoff?
A. I did.
Q. What?
A. I did.

Mr. Patur: I offer that in evidence.
Mr. Rosen: Same objection.

The Court: Same ruling, overruled.

Mr. Rosen: That note also includes protest notices, your [fol. 2747] Honor, the same as the other one, and they can all be marked as one exhibit.

The Court: All right.

(Marked Claimant S. Forman Exhibit 13 in evidence.)

Q. Now, Mr. Forman, is the same thing true in connection with this loan that you made to Wales Properties, Inc., the getting of the note, the getting of the check and the renewal of the note on March 12, 1953; is it true as to Wales Properties, Inc. the same as you testified before as to Ambassador Estates, Inc.?

A. This was done at the same time.

Q. And in the same manner?

A. In the same manner.

Q. Now, Mr. Forman,—

The Court: May I interrupt a moment? Am I to understand by that testimony that on August 28, 1952 you gave Mr. Malakoff $5000 and you received a note due March 12, 1953, and that on March 12, 1953, when you presented that note to Mr. Malakoff for payment by Wales Properties, Inc., he said they didn't have the money, and he destroyed that note and he gave you Claimant's Exhibit 13 in place of it?

[fol. 2748] The Witness: That's right, the two transactions are the same, yes, sir.

The Court: On August 28, 1952, when you gave Malakoff Claimant's Exhibit 12, which is the Forman check of $5000 drawn to the Wales Properties, Inc., did you receive anything back?

The Witness: Yes, I received the same amount of $250.

The Court: And that was also in cash?

The Witness: It could be in cash or check, your Honor; I don't remember exactly, but I did receive it.

The Court: I pause to inquire of the debtor's counsel whether any checks from Malakoff to this claimant appear to have been made out on August 28 of 1952?

Mr. Rosen: No, your Honor. On August 8th there is a check for $250.

The Court: All right, proceed.

Q. Now, Mr. Forman, neither the Ambassador Estates note nor the Wales Properties, Inc. note was paid, is that correct?

A. No, no.

Q. And did you bring an action—

Mr. Rosen: Excuse me, your Honor, I am sorry. Was [fol. 2749] your question that in August he got two checks of $250 or in March he got $250, the same as the other one?

The Court: Wait a minute. His testimony was that in March he got $1500, $500 on Wales, $500 on Ambassador and $500 on Nazareth.

Mr. Rosen: Thank you, your Honor.

The Court: The testimony originally was that in August he got $250 on Ambassador and then I asked him whether he got the same thing on Wales, and he said yes.

Mr. Rosen: Thank you, your Honor.

Q. Did you bring an action in the City Court, New York County, against John Malakoff and Ambassador Estates, Inc. on that $5000 note?

A. I did.

Q. And did you obtain a judgment against John Malakoff and Ambassador Estates, Inc. in the City Court?

Mr. Rosen: Your Honor, I have the same objection.

A. I did.

The Court: Overruled.

Mr. Rosen: Thank you.

The Court: I want to pause for a moment, Mr. Patur. [fol. 2750] It might have just been a slip of the tongue in framing the question, but you asked, "Did you bring an action in the City Court on the $5000 Ambassador note and the $5000 Wales Properties note?" Do you mean separate actions?

Mr. Patur: I meant separate actions on each one.

The Court: All right.

Mr. Patur: May I at this time offer in evidence the file in the action of Seymour Forman against John Malakoff and Ambassador Estates, Inc. of the City Court of the City

of New York, New York County, under Index No. 13059—1953, and the file in the same court in the action of Seymour Forman against John Malakoff and Wales Properties, Inc. under Index No. 13060—1953?

The Court: Wait a minute. Let us take one at a time.

Mr. Patur: Pardon me, your Honor.

Mr. Rosen: Same objection as previously stated.

The Court: Overruled.

The first one that was offered was the file of the City Court of New York County No. 13059—1953, Forman against Ambassador and Malakoff. Mark that one first. [fol. 2751] That is deemed marked and the parties will agree as to the papers, and they will, when they are collated and turned over to the clerk, be marked Claimant's Exhibit 14.

(Deemed marked Claimant S. Forman Exhibit 14 in evidence.)

The Court: Now the next one. What was the number of the City Court file on that one, the one against Wales?

Mr. Patur: 13060—1953.

The Court: And the same course will be pursued as to that file, which will be deemed marked Claimant's Exhibit 15. The debtor's objection being overruled.

(Deemed marked Claimant S. Forman Exhibit 15 in evidence.)

Q. Now, Mr. Forman, were you ever paid any part of any one of these $5000 loans?

A. No, never.

Q. Do you know what the condition of the corporation known as Ambassador Estates, Inc. is?

Mr. Rosen: I object.

A. Defunct.

The Court: Sustained; strike out the answer.

Q. Mr. Forman, before the bringing of these Chapter X [fol. 2752] proceedings and subsequent thereto have you received various notices addressed to you as a stockholder of the debtor corporation for attending such meetings?

Mr. Rosen: If your Honor pleases, I object to that. It has no bearing. The matter was already in litigation.

The Court: Sustained.

Mr. Ratur: No further questions.

Cross examination.

By Mr. Rosen:

Q. Do you have any books or records of transactions that you had with John Malakoff during the years 1951, 1952 and 1953?

A. No, I did not.

Q. You had no records?

A. No book.

Q. Do you have any records?

A. No.

Q. Were you asked on the examination before trial held on September 5, 1958, the following questions and did you give the following answers:

"Q. Do you have any checks that were drawn, checks that you gave Malakoff for the year 1951?

"A. Unfortunately, since I had been disconnected with [fol. 2753] Mr. Malakoff, I had bought a store, and the records that I had, which I would put my head on, I finally found that the whole box of them are missing. I don't have them. The reason why I didn't diligently get it then is because I knew in the proceedings that we had in City Court, John Malakoff admitted that he got the money and that he owed the money, and he admitted that he got the money and that he owed the money to me, therefore, I didn't keep a record any more."

Were you asked that question and did you give that answer?

A. Did I give at that time, yes.

Q. Did you also testify unequivocally later on in the examination that you did have books and records but you lost them in this store?

A. I could explain this if your Honor would allow me.

The Court: Where is that inconsistent with the present testimony? What is the inconsistency?

Mr. Rosen: He claims when I asked him—he said he had no books or records.

A. I have not; I still don't have—

The Court: Just a minute. The question was not ad-
[fol. 2754] dressed to you, Mr. Forman.

Mr. Rosen: I will come to the books and records.

The Court: Wait a minute. I want to know what there is that he testified to in this trial that is inconsistent with what you are reading from the deposition.

Mr. Rosen: I asked him if he had any books or records, your Honor, of his transactions—

The Court: Will you read Mr. Rosen's first question back?

(Question read.)

The Court: That is "Do you have." That is the present.

Mr. Rosen: I am sorry.

Q. Did you have any books or records in the years 1951, 1952 and 1953 of your transactions with Malakoff?

A. Only checks records.

Q. You never had any other books or records?

A. No.

Q. At the end of the year 1951 you had no open transactions with John Malakoff, is that correct?

Mr. Patur: May it please the Court, I object to that. I
[fol. 2755] don't think that the testimony is relevant here to the matter before the Court at this time.

Mr. Rosen: Your Honor, there were checks and payments in the subsequent years that will be brought in—

The Court: Overruled. Answer the question.

A. What is the question again?

(Question read.)

A. I myself, no.

The Court: By that are we to understand that you mean that you did have no open transactions or unconcluded transactions as of that time?

The Witness: No, your Honor. It might be a transaction which was in somebody else's name that I took care of.

The Court: The only reason that I asked my question is that the answer "No" is ambiguous, because of the form of the question which could be taken five different ways.

Q. You had no money due you from John Malakoff and you had no investments?

A. I must answer again, I myself, no; I myself.

[fol. 2756] Q. Mr. Forman, did you testify that you gave Claimant S. Forman Exhibit 12 to John Malakoff for Wales Properties, Inc. on August 28, 1952?

A. I gave that money—I did testify.

The Court: Will you please keep your voice up?

The Witness: I am sorry.

Q. And that you received a note from John Malakoff payable March 22, 1953 and that you did not receive this note, Claimant S. Forman Exhibit 13, this identical note?

The Court: Did you mean to say March 22nd or did you mean to say March 12th?

Mr. Rosen: March 12, your Honor.

The Court: All right.

A. What is the question again?

(Question read.)

A. I don't understand the question. I don't even understand that.

Q. You gave John Malakoff on August 28, 1952 Claimant S. Forman Exhibit 12, is that right?

A. On this date, yes.

Q. But you did not receive on that date Claimant S. Forman Exhibit 13, is that right?

[fol. 2757] A. I did receive the note with that. Yes, I did.

The Court: Take Claimant's Exhibit 13 in your hand, Mr. Forman. Hold it. Have you got it?

Give it to him, Mr. Rosen.

Mr. Rosen: It is right in front of him.

The Court: Is that the one you got on August 28, 1952?

The Witness: No, sir.

The Court: That is all Mr. Rosen asked you.

The Witness: I didn't understand him, your Honor, I am sorry. I did not receive it.

The Court: You tore up what you gave to him on March 12th or he tore it up and he gave you this one?

The Witness: That's right; that's what I said before.

Q. On your examination before trial on September 9, 1958, were you asked the following questions and did you give the following answers:

"Q. What did you receive on August 28, 1952 from John Malakoff?

"A. I received notes.

"(Paper was handed by counsel.)

"Mr. Rosen: Claimant exhibits a note dated August 28, [fol. 2758] 1952, for $5000, signed Wales Properties, Inc., John Malakoff, President, and on the reverse side appears the notations, John Malakoff, Seymour Forman as agent; attached thereto is a protest notice."

Were you asked that question and did you exhibit that note as having received it on August 28, 1952?

A. I understand the same way as I understood you now and I answered the same way—I did not understand it; you didn't put the question to me right.

Q. Were you asked that question and did you give that answer?

A. Did I give that answer? Probably yes, I suppose. I didn't understand it. Now that I understand it—

Q. I merely asked you, Mr. Forman, were you asked that question and did you give that answer?

A. Yes, I gave—I must have given that answer. I rely on the record.

Q. And then:

"Mr. Rosen: Claimant produces note dated August 28, 1952 for the sum of $5000, to the order of claimant, signed Ambassador Estates, Inc., John Malakoff, President, and [fol. 2759] on the reverse side appears the notation, John Malakoff, Seymour Forman, agent. I ask that the note be marked for identification together with the protest notices attached."

Mr. Seligson: Is there a question?
The Court: Not yet.
Mr. Rosen: Not yet.

Q. And were you asked this question and did you give this answer:

"Q. Did you have any other transaction with John Malakoff for any company he was connected with in between August 28, 1952 and July 3, 1953, when it appears that Debtor's Exhibits 4 and 5 were protested?
"A. I don't understand that question.
"Mr. Rosen: Read the question.

"(The last question was read.)

"Q. Meaning, those notes in between those dates, did you have any other transactions?
"A. No."

Were you asked that question and did you give that answer?
A. As I must have understood it at that time, yes.
Q. Were you asked that question—
[fol. 2760] A. If you would ask me questions which were relevant, like the $2000 which I have here a check, which came back, I would be able to answer those questions. The way you put the questions to me I couldn't understand them at all.
Q. Mr. Forman, will you kindly respond. Were you asked that question—
A. I am responding.
Q. —and did you give that answer?
A. I am responding, yes. I answered at that time—I did not understand it but I answered it.

The Court: Excuse me just a moment. At the time that you were asked that question and the word "transactions" was used—
The Witness: Yes, sir.
The Court: —what did that mean to you with respect to Wales and Ambassador?

The Witness: It meant this, your Honor: Where I got $250 for these here two transactions, I gave him a $2000 check; he gave it to me ahead of, to help him out for the weekend, from Friday to Monday, a few transactions of that sort, no profit, no consideration whatsoever, just the plain ordinary favor to him, if he wants to mix in these [fol. 2761] years, those are transactions, but I didn't understand what he meant, which I think I have a case. Didn't we have a $2000 recently—

The Court: Strike that out.

Mr. Patur: Just answer the questions, Mr. Forman, which are put to you. Don't volunteer any answers.

The Witness: Okay, I am sorry.

By Mr. Rosen:

Q. Did you tell this Court that you received some moneys or payments on these notes in advance or at the time you gave him the money for these notes?

A. I say yes, $250 each on these two here notes, and $500 each on the renewals at that time.

Q. Were you asked this question and did you give this answer:

"Q. Did you receive any moneys or payments, or did your wife receive any moneys or payments, or anyone on your behalf from John Malakoff, or any firm connected with him between the dates of August 28, 1952 and July 3, 1953?

"A. No, sir."

A. I didn't understand your question.

Mr. Patur: May it please the Court, I rise to indicate [fol. 2762] that Mr. Rosen was referring to other transactions, that is, transactions other than these.

The Court: Even if he were not I fail to recognize any inconsistency because of the fact that the man testified that he received $250 in each transaction on August 28th when he gave him the checks, and the question is between August 28th and July 3rd.

Q. Isn't it a fact that you extended these notes on July 13th?

A. This is not a fact, no.

Q. Of 1953?
A. No. July 3, 1953, two of them.
Q. You extended them to when?
A. Two to July 3rd and one to July 13th, on March 12th.

The Court: We will take a recess.

(Short recess.)

By Mr. Rosen:

Q. Later on in the examination were you asked the following specific questions and did you give the following specific answers, beginning at page 25:

"Q. I would like for the moment the dates. As you claim you are confused, let us try to confine it to the transac-
[fol. 2763] tion.
"A. All right, to the transaction.
"Q. Try to refresh your recollection from the transaction.
"A. Right.
"Q. You spoke of one transaction which took place on August 28, 1952, where you gave Mr. Malakoff two checks for $5000 each, is that correct?
"A. Yes, that would be August 28th, two notes.
"Q. Here are the checks?
"A. Yes, August 28th.
"Q. Then on August 28, 1952, when you gave Malakoff these two checks for $5000 each, he gave you these two notes of $5000 each dated August 28, 1952, Ambassador Estates, Inc.?
"A. Right.
"Q. And Wales Properties? Correct so far?
"A. Right.
"Q. Those notes were payable on July 3, 1953? Look at the date on the notes. Is that correct?
"A. Yes."

Were you asked those questions and did you give those answers?
A. I don't recall the questions being asked like that, but
[fol. 2764] it is incorrect. I stated today the correct dates and that's the truth.

Q. Now by July of 1953 Malakoff was already in trouble; isn't that correct?

A. I wouldn't know about that.

Mr. Patur: I object to the question, if your Honor please.

The Court: Overruled.

Q. What is your answer?

A. I am not the expert to know if he was in trouble.

Q. You weren't advised that he was not paying dividends and that he was not meeting his debts in May, June and July?

A. No.

Q. Did you receive any dividends in June or July?

A. Any dividends?

Q. Yes, on investments in Nazareth.

A. No, I did not receive any.

Q. How about April or May, did you receive any dividends in April or May on Nazareth?

A. The only things I received was $500 bonus. I didn't receive no—

Q. You did not receive, however, dividends in April, May, [fol. 2765] June or July, is that right, 1953?

A. No, I didn't.

Q. Let us get back to today's story and let me kindly ask you this: On March 12, 1953 Malakoff didn't have the money to meet the two notes that you claim were original notes payable on March 12, 1953, is that correct?

A. March 12, 1953?

Q. That's right.

A. At that time he wanted them extended.

Q. He did not have the money, he said, and told you so; isn't that right?

A. He told me so.

Q. What?

A. Yes.

Q. And yet you gave him $5000 more in money, you claim?

A. Yes, I certainly do claim, certainly.

Q. As regards your books, on page 8, Mr. Forman, were you asked the following questions and did you give the following answers:

"Q. Any ledger, any memorandum books?

"A. Whatever books I had was together with all the other records.

[fol. 2766] "Q. Which you now claim were lost?

"A. That's right."

Were you asked those questions and did you give those answers?

A. I meant checkbooks; I have no records. I testified to that. I have no books.

Q. Did you say checkbooks or books together with all other records?

A. If I said it. I meant my checkbooks, which I didn't have any checkbooks. I have been looking for them ever since.

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[fol. 2781] Q. Mr. Forman, didn't you testify in a proceeding in this court that you cashed two checks and took the cash of the two checks to Mr. Malakoff for the $5000?

A. I possibly did.

Q. What?

A. I possibly did.

Q. Which testimony is true? Did you cash two checks for $5000 or did you cash one check for $1800 or something or advance interest?

A. As I got the question—

The Court: Would you read the question back to the witness?

(Question read.)

The Court: Now, is either one of them true?

The Witness: Both of them are not true.

[fol. 2782] The Court: Next question.

Q. And do you claim that you cashed two checks one at the Marine Midland and one at the Sterling National Bank for $5000?

A. That is the same question; I said I did.

Q. You mean you so testified under oath?

A. As I understood at that time, as to my recollection, yes.

Q. And did you cash those two checks—

A. I have to get the bank records to refresh the memory.

Q. And did you cash those two checks on March 12th for the $5000?

A. I did not cash the checks. One check and cash—

Q. Did you testify that you—

The Court: Let the witness complete his answer. Did you complete your answer?

The Witness: One check and the cash plus the $1500, that was the bonus.

Q. Did you testify that you cashed two checks for $5000 on March 12, 1953?

A. On that date, yes, I testified. I think I remember it [fol. 2783] now, yes, I did.

Q. Now you testified in court that you didn't cash two checks, is that correct?

A. That's right. I recollect now. It refreshed my memory.

Q. It was after I asked—

The Court: Stop the argument. What is your next question?

Q. Isn't it a fact that you refreshed yourself after I asked for the copy of the bank reports to see the withdrawals?

A. I asked for them. I made out the—

Q. No, but I asked that they be brought to the examination; isn't that true?

A. I signed and demanded that long before—I demanded the copy from the bank.

Q. Did you have them before the examination?

A. No, there was a removal of the bank, one of the banks, and they couldn't furnish them to me, long before you asked for them.

Q. Now you had a subsequent examination on October 28, 1958, the previous one having been on September 9th. Were you also mixed up on October 28, 1958 or was your mind in a settled condition?

[fol. 2784] A. I want to make a statement: The way you asked the questions I was confused on that examination too—the way you asked the questions.

Q. On the examination of October 28th, on page 37, were you asked the following questions and did you give the following answers as regards the checks and notes, Exhibits 2 and 4:

"Q. Mr. Forman, on what date did you give Debtor's Exhibit 2 for identification to John Malakoff?

"A. August 28, 1952.

"Q. On what date did you receive Debtor's Exhibit 4 for identification of 9/8/58?

"A. August 28, 1952."

Were those answers true when you made them?

A. I don't know. At that time I couldn't—

Q. That was at the beginning of the examination, the first two or three questions?

A. Why, I don't even know what exhibits you refer to. Show me what it refers to, the exhibits.

Q. Plaintiff's Exhibits 2 and 4, 2 being the check of August 28, 1952 to Wales Properties, Inc., and Plaintiff's Exhibit 4 being the $5000 note given to you on Wales Properties, Inc.

The Court: Just a moment. Is Plaintiff's Exhibit 2 for [fol. 2785] identification in the deposition of this witness in October Claimant's Exhibit 12 in this trial, and is Plaintiff's Exhibit 4 for identification in that deposition Claimant's Exhibit 13 at this trial?

Mr. Rosen: Yes, your Honor.

The Court: All right.

Q. I ask you to look at the examination and see if those are the first three or four questions that were asked when the examination started that day.

A. Whatever it is here, I couldn't understand what you said to me that day. Honestly, I couldn't answer them.

Q. That was on the second day, you couldn't understand?

A. That's right, on the second day. You knew that, the way you put those questions to me, I couldn't answer them, I don't know.

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[fol. 2803] Cross examination.

By Mr. Weinstein:

Q. On March 12, 1953, just so I understand you, Mr. Forman, the total amount that you gave to Mr. Malakoff on this Nazareth loan transaction as represented by the note that you received, was the $1900 stemming from the withdrawal of $1900 from the bank, as you have testified, is that so?

A. That's right.

Q. And $1600 which you said that you had in cash on [fol. 2804] your person, is that correct?

A. Yes.

Q. That is a total, of course, of $3500?

A. $3500.

Q. And that is all that you gave to Mr. Malakoff in exchange for which you received this $5000 note, is that correct?

A. After he told me to deduct $500 on the renewals and $500 on the Nazareth.

Q. Yes.

A. That made it net.

Q. The net payment—

A. That's right.

Q. —made by you was only $3,500, is that right?

A. That was according to his request.

Q. But that was all that you paid him?

A. That's right.

Q. His request or not, is that so?

A. Correct.

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[fol. 2807] Q. When you had completed the discussion about the security then what happened?

A. Then I gave him the money and he gave me the stock, which he endorsed.

Q. Did he take this stock certificate out of a stock certificate book?

A. Did he take the stock certificate? I didn't notice. He had a book, a stock certificate book, on the desk but—

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[fol. 2920]

STIPULATION OF COUNSEL RE GILBERT SUNSHINE

Mr. Rosen: It is stipulated and agreed by the attorneys present in this proceeding that if Gilbert Sunshine were to testify, he would testify that he was the accountant for the Ambassador Estates, Inc. in the month of April 1953, and that the books and records of Ambassador Estates, Inc. indicate that Ambassador Estates, Inc. did not pay its rent pursuant to its lease for the month of April 1953, and that Ambassador Estates, Inc. as tenant, was in default under such lease for non-payment of rent.

Mr. Seligson: That is agreed to.

[fol. 2927] Direct examination of
Louis P. Como.

By Mr. Rosen:

Q. When did this second transaction take place, who was present, what was the conversation and where?

A. It took place at 240 Madison Avenue in 1953, the very [fol. 2928] beginning—I went down and I bought four more shares, two for myself and two for my brother Frank.

Q. What was said at that time?

A. I paid the $4,000, two for me and two for Frank each and I got a receipt for it, a stock receipt.

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[fol. 2966] LOUIS P. COMO resumed.

Direct examination.

By Mr. Rosen:

* * * * * * *

Q. Do you recall when that occurred, and refresh your recollection if you can as to the time you made yours and when you made his.

A. In February when I bought the four shares, then after, about March, I went to Patsy and I says, "Gee, Pat, over here is a good deal. Do you have some money you want to invest? There's some shares you can buy, because I already have six and Frankie has six."

He said, "How many could I buy?"

I said, "Let me find out."

So I called up Mr. Malakoff, and I said, "John, my brother wants to buy some shares into the market." I said, "How many could he buy?"

He said, "He can have six."

[fol. 2967] I went up and told Patty and I say, "Pat," I says, "over here you can get six shares for $1,000 apiece and you will get a check every month; it's a good investment."

* * * * * * *

[fol. 2999] Cross examination of
Seymour Forman, resumed.

By Mr. Seligson:

Q. And at the time you made these loans I understand it to be your testimony that John Malakoff executed and delivered to you these promissory notes of Ambassador Estates, Inc. and Wales Properties, Inc., marked Claimant [fol. 3000] S. Forman Exhibits 11 and 13, is that right?

A. That is correct.

Q. Please understand me, I am not saying, it is my understanding that these three notes, which have been marked Exhibits 11 and 13 were delivered to you by John Malakoff at the time you advanced the $10,000 to Wales and Ambassador; is that true or not?

A. These two were delivered to me on this date?

Q. That's right.

A. No.

Q. That is not true?

A. Not true, because they had been renewed.

Q. In other words, these are not the notes—that is your testimony now—these are not the notes that were given to you by Malakoff on August 28, 1952; is that true?

A. That is right.

Q. Is that your testimony?

A. My testimony has been that they had been renewed.

Q. Please; I just want to know if that is your testimony. It is, isn't it?

A. Yes.

[fol. 3001] Q. When were the notes due—

A. Due—

Q. —that were given to you by Malakoff on August 28, 1952?

A. March 12.

Q. March 12, 1953?

A. '53.

Q. Was there any special reason why these notes, the notes that you say were given to you on August 28, were made payable on March 12?

A. Was there any reason?

Q. Yes. Why March 12 instead of March 1st, or March 15 or April 1st?

A. To his convenience, according to how he wanted it, that is all.

Q. Did Mr. Malakoff tell you that he wanted to borrow $10,000 which would be repaid on March 12, 1953?

A. If I can remember correctly, he didn't want it to fall on the first because he would have certain payments to make. So he asked for the 12th, and I gave him the 12th.

Q. This is September, October, November, December, January, February and March. So that you were lending [fol. 3002] him or lending the corporation this $10,000 for about six and a half months, is that true?

A. That is true.

Q. Did Mr. Malakoff ask you to lend the corporation $10,000 for six and a half months?

A. Yes.

Q. Is that what he said to you?

A. That is right. We made that for six and then up to the 12th would be six and a half.

Q. I don't understand you. You made it six, which would make it—

A. And I wanted—

Q. —February 28th.

A. I wanted it on the 1st or 28th. He said, "It would be better for me to have it on the 12th, 12th of March."

Q. So he asked you for a six months loan?

A. That is right.

Q. You agreed finally to give him this extra half a month because he might not have the money on the 1st of the month, is that it?

A. As a matter of convenience for him, certain payments he would have to make, should be easier for him to make on the 12th.

[fol. 3003] Q. Did you discuss with Malakoff on August 28th the amount of the bonus that you were to get?

A. On when, on March?

Q. March 28th.

A. A few days before.

The Court: Just a minute.

Q. I am sorry, on August 28th.

A. What was that?

Q. Did you discuss with Malakoff on August 28th the amount of bonus that you were going to get for lending him $10,000 for six and a half months?

A. Yes, we discussed it, and, to the best of my knowledge, it was $250 for each.

Q. You talked about it with him?

A. Yes, sure.

Q. How much did you ask for?

A. I had to talk to make a deal.

Q. How much did you ask for originally?

A. How much did I ask for originally?

Q. Yes.

A. No, I left that to him.

Q. What did you say to him?

A. I didn't say anything to him.

Q. He asked you to lend him $10,000?

[fol. 3004] A. That is right.

Q. What did you say?

A. What did I say?

Q. What did you say when he asked you to lend him $10,000, "Yes, I'll give it to you"?

A. I told him I wanted $500.

Q. You asked for $500?

A. Yes.

Q. Bonus?

A. Mutually agreed.

Q. That was mutually agreed that you would get $500 bonus, is that it, and you didn't ask for any larger bonus? Didn't you ask for a thousand dollar bonus immediately?

A. Did I ask for a thousand?

Q. Yes.
A. No, I didn't. I don't recollect and I am sure I didn't.
Q. Was it agreed that the notes would bear interest?
A. No.
Q. You were going to let him have this $10,000 for a bonus of $500 without any interest being paid on the loan—on the notes?
[fol. 3005] A. It said no interest on the notes.
Q. I am asking you what the agreement was.

The Court: Just a minute.

A. I mean—

The Court: Mr. Forman, you say it said no interest on the notes. You don't have here the notes that he gave you on August 28th. The notes you have are notes he gave you on March 12th.
The Witness: I testified they were similar to this.
The Court: Answer the question and don't—
The Witness: Similar to this.
The Court: —don't give explanations. I don't care what it says anywhere. Answer the question, please.
The Witness: That is right.

Q. Did you talk about interest on the promissory notes?
A. On the 1st?
Q. On August 28th, 1952.
A. Yes.
Q. You did? What was said about interest?
A. We mutually agreed $500 for the two transactions.
Q. That was to cover interest and bonus?
[fol. 3006] A. Interest and bonus.
Q. Cover everything?
A. Yes.
Q. That you were to get?
A. That's right.
Q. Did you in September of 1952 get any money from John Malakoff?
A. September?
Q. September of 1952.
A. 1952?
Q. Yes. That is to say, you or your wife, Yvette Forman.

A. I cannot remember. I don't remember that.
Q. Did you get a bonus from him in that month?
A. September?
Q. Yes, in the month of September 1952.
A. It is too long ago that I should commit myself to say if I remember. I don't remember.
Q. You might have gotten a bonus from him, is that it?
A. (No answer.)
Q. Is that your testimony?
A. No, I don't think I got anything.
Q. Is it your testimony you don't remember or is it your [fol. 3007] testimony that you didn't?
A. My testimony is I don't remember.
Q. You just don't remember whether you did or not, is that it?
A. Yes.
Q. If I say to you, in the light of your testimony, that John Malakoff in an affidavit which was sworn to on the 9th day of July 1953, within one year after these loans were made, said as follows, "On August 28, 1952"—and which affidavit is included in the file of the City Court action instituted by you against Mr. Malakoff and against Wales, which file was put in evidence by your attorney—

The Court: Claimant's 12.

Q. —Claimant's Exhibit 12—if I say to you that John Malakoff said as follows, "On August 28, 1952 I borrowed $10,000 from Mr. Seymour Forman for my personal use. I gave him two notes, one for the Wales Corporation for $5000 and one for the Ambassador Corporation for $5000 because he wanted to have it done that way. I paid him $1000 interest each month for the first two months in cash because he didn't want to take a check", and you would say that you don't remember whether that is true or not?
[fol. 3008] A. No, I would say it is absolutely false.
Q. Then is it your testimony that—
A. My testimony that I did not receive that—
Q. —you did not receive a thousand dollars?
A. That is right.
Q. In interest in August when you made the loan and another thousand dollars in interest—

A. Absolutely.
Q. —or bonus?
A. Untrue.
Q. One minute. In September 1952.
A. Untrue.
Q. How much did you get in September 1952 from Mr. Malakoff by way of bonus?
A. I didn't get anything that I can remember because August, September, one month—
Q. September.
A. No, no money yet.
Q. You didn't get any money from him?
A. No, sir. Also, the statement that it was loaned to him personally is absolutely untrue.

Mr. Seligson: I ask that that be stricken out, your Honor.
The Court: Strike it out.
[fol. 3009] The Witness: It was read in the record, you said.

Q. Will you please answer questions?

The Court: Mr. Forman, your counsel got up at the opening of court today and requested that you be handled very tenderly because you are tired and you don't feel well.
The Witness: Well—
The Court: All I can say to you—keep quiet—all I can say to you, sir, is that if you want tender handling, don't invite otherwise by making gratuitous and unsolicited statements.

Q. I show you Claimant S. Forman Exhibit C and I direct your attention to the deposit of $500 that was made here on September 9 and ask you what was the source of that fund.

The Court: Would you read that question.

(Record read.)

The Court: That is Examiner's C.
Mr. Seligson: I am sorry.

Q. (Continuing) Examiner's Exhibit C in the S. Forman matter and direct your attention to this $500 deposit that

was made on September 9, 1952, and I ask you what was the source of those funds.

[fol. 3010] A. That could have been the $500 check I got for the bonus for the two transactions.

Q. Isn't it a fact, Mr. Forman, that Mr. Malakoff gave you whatever bonus it was, whether it was $500 or a thousand dollars, that he gave it to you in cash?

A. In cash, the beginning, at the outset? No.

Q. Are you testifying that you gave him these two $5000 checks and that he in turn gave you a $500 check of his own?

A. That is right.

Q. Or one of the corporations?

A. A check of—it might be his own or—

Q. But you say you got a check?

A. I got a check.

Q. Whose check was it?

A. For $500. I don't remember whose check it was. I can't remember that.

Q. You are sure it was a check?

A. Check of $500, I know. This was—

Q. Were you in the habit of keeping checks for $500 and more on your person or elsewhere without depositing them?

A. Yes.

Q. For a period of two weeks?

[fol. 3011] A. John Malakoff's checks, yes.

Q. Was there some special reason given to you by Malakoff for not depositing that $500 check at once?

A. The special reason is that when I was in his office and I had various transactions, in buying, selling real estate, and if he asked me to hold a check for a little longer time, yes.

Q. Did he ask you to hold it?

A. Did he? Yes, he did ask me—

Q. He did?

A. —on plenty of occasions.

Q. I am not asking you about on other occasions.

A. Yes.

Q. I am talking about what he did when you gave him the $10,000. Did he ask you to hold this $500 bonus check?

A. He possibly didn't ask me.

Q. Did he or did he not?

A. I don't remember. I don't know.

Q. You don't remember what the source of this deposit of September 9th was?

A. Possible, yes.

Q. You don't remember?

A. I don't remember.

[fol. 3012] Q. Do you have any record that would enable you to give us that information?

A. I have no records whatever, only check records. That was my only records I kept.

Q. Did you make an entry on your checkbook of the receipt of a bonus of $500?

A. Entry on the checkbook?

Q. Yes.

A. No, not—I make an entry as to money, that's all. What it is, I don't remember.

Q. Where is your checkbook, checkbook you used in 1952?

A. That was part of all the records which we have to subpoena now that was lost in a transaction when I had moved three different times.

Q. Did you make an income tax return for 1952?

A. I certainly did.

Q. Do you have a copy of that income tax return?

A. No, I don't have a copy of it here.

Q. Do you have it at your home?

A. It could be in the whole records, like the checks and everything that I kept together for each year.

Q. Did you in October 1952 get a bonus or any interest [fol. 3013] from Malakoff, or Wales or Ambassador, on the $10,000 loan?

A. No.

Q. I call your attention to Examiner's Exhibit C in this matter and to the deposit of $500 made on October 1 and I ask you what was the source of those funds.

A. I couldn't tell you now. I don't know.

Q. You weren't engaged—

A. Not from Malakoff.

Q. How do you know—

A. Yes.

Q. —it was not from Malakoff?

A. I was engaged in small transactions.

Q. What transactions were you engaged in in October 1952?

A. With Malakoff it could have been—

Q. Then you got that money from Malakoff?

A. No, it could have been something that I made with the transactions with—not in these transactions but real estate transactions.

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[fol. 3019] Q. Then when you went in to see him, you sat down to talk to him. He said to you he wanted to extend the Wales and Ambassador notes?

A. Right.

Q. Is that it?

A. Yes.

Q. Then you said, as I understood before, if you wanted to make the $500—it wasn't clear to me.

A. To make $500 each for the extension of these two notes—of these two notes. So I said, "Yes, I'll extend it."

Q. For $500 each?

A. That is right.

Q. For a bonus of $500 each, and how long an extension did he want?

A. Until July 3rd.

Q. In other words, he was saying to you in March 1953, according to you, that despite the fact that business was good both at the Ambassador and the Wales he wanted an extension and he was willing to give you $500 bonus on each note to extend it—the time of payment from March 12 to July 3rd?

A. Right.

Q. In other words, a period of about three and a half [fol. 3020] months?

A. Three and a half months.

Q. Is that it?

A. That is right.

Q. You had before, you testified, asked him only $250 as a bonus for making the loan?

A. I said we mutually agreed.

Q. A loan of six months—excuse me—a loan of six months and now you say that he voluntarily offered to give you $500—

A. That is right.
Q. —on each note?
A. That is right.
Q. For an extension of three and a half months?
A. Yes, sir.
Q. Did you say anything at the time to him about security?
A. Then?
Q. Yes.
A. Yes.
Q. What did you say about security?
A. How about the other loan, the Nazareth loan? Yes, in conjunction with the three.
Q. Did he ask you for any additional moneys?
[fol. 3021] A. Yes, he asked me for $5000 for Nazareth Fair Grounds, Inc.
Q. Did he tell you that his company needed $500, the Nazareth Company needed $5000?
A. He said that it needed $5000.
Q. Are those the words he used?
A. Yes.
Q. That Nazareth needs $5000?
A. He wants $5000 for Nazareth Fair Grounds, Inc. loan.
Q. That is what he told you, now?
A. Yes.
Q. He wants $5000 for Nazareth Fair Grounds & Farmers Market—
A. That is right.
Q. —Inc.?
A. That is right.
Q. What did you say?
A. What did I say?
Q. Yes.
A. I said, "I will give it to you."
Q. Did you say anything else?
A. Well, the only thing that I did do—to him at that time?
[fol. 3022] Q. Yes.
A. I said, "I have to investigate and find out some things."
Q. Was this before you told him that you would extend the Wales and Ambassador loans?

A. That's right.

Q. You told him you would have to investigate something?

A. Yes, sir.

Q. Did you tell him what it was you wanted to investigate?

A. Yes, I wanted to go down to Richard S. Hull, which was my attorney too at that time in various things, and his attorney, and I wanted to know how good the market—what he knew of how good it was doing, and if it warranted for me to make the extensions and to give him the $5000.

Q. What did the market have to do with the extension of the loans on Wales and Ambassador?

A. I wouldn't have extended those two notes, if not—if the market wasn't doing well enough and if Mr. Hull wouldn't recommend it.

Q. Didn't you believe Malakoff when he told you that Wales and Ambassador were doing well?

[fol. 3023] A. Did I believe him?

Q. Yes.

A. I didn't want to believe him.

Q. What?

A. I didn't want to believe him. I wanted to investigate.

Q. What had happened between August 28, 1952 and March 11—and March 8th or 9th or 10th, whenever you saw him, to make you change your opinion as to the soundness of the loans to Wales and Ambassador?

A. What made me?

Q. Yes. You said you didn't want to believe him when he told you—

A. That is right. They were due and I wanted to get my money. That's what.

Q. He asked you for an extension and offered to give you twice as much bonus as you had gotten when the loan was made and you say you weren't satisfied with him, you wanted to make an investigation of Nazareth?

A. That is right, yes, sir.

Q. What did Nazareth have to do with the extension of the Wales and Ambassador notes?

A. I wanted collateral. I wanted security for the three

[fol. 3024] notes.

Q. Is that what you told—
A. Yes, sir.
Q. —Malakoff?
A. Yes, sir.
Q. The first time you went down?
A. That's right.
Q. To talk about the—in response to his invitation to come down?
A. That is right.
Q. You told him then that you wanted security in the form of Nazareth stock to cover Ambassador and Wales notes?
A. Yes. He had the stock, he owned the stock; I knew that he was principal owner there.
Q. You didn't ask him for security on August 28, 1952, did you?
A. August 28th? No.
Q. You weren't concerned about your loans then?
A. I wasn't concerned?
Q. Yes.
A. I was concerned, yes.
Q. You were concerned?
A. Yes.
[fol. 3025] Q. Then too?
A. Yes, I was concerned.
Q. Isn't it a fact that because of your concern you charged a very high bonus and that what Mr. Malakoff said in his affidavit concerning what he paid you is true?
A. Is absolutely untrue.
Q. After you went away, left him, did you see Mr. Hull?
A. Yes.
Q. Did you come back and see Malakoff again?
A. Yes.
Q. What did you say to him when you came back?
A. I said to him that I spoke to Mr. Hull; he told me that he was the principal owner of the stock in Nazareth Fair Grounds.
Q. Who was "he", Malakoff?
A. That Malakoff was. He was the president and that it would be okay to give the $5000 loan to Nazareth, and that he owns the stock, he would give it to me as collateral,

it would be okay to do that, to do the whole deal through for the $15,000.

Q. Did you on March 12, 1953 actually give Malakoff $5000?

[fol. 3026] A. Yes.

Q. Or—you did?

A. I gave to him, not five—

Q. What did you—

A. I was prepared to give him—

Q. —give him?

A. He gave me $500 on each of these three notes. That would be Wales, Ambassador and Nazareth. So he counted that as 1500. I gave him a check for 1900, which I cashed the next day in the other bank, what do you call it, Sterling Bank, because that was convenient to my house, I lived near there, and I had at that time total altogether $1600, which was a total of 5000.

Q. Where did you get the $1600?

A. I had testified at that time again I always had money with me. I made some deals with Malakoff, smaller deals, which had nothing to do with these deals.

Q. Had Malakoff given you the $1600?

A. Who?

Q. Malakoff.

A. No. I had cash from various things which—

Q. So Malakoff told you that he wanted $5000 for Nazareth Farmers Market—Nazareth Fair Grounds & Farmers [fol. 3027] Market—and you ended up by giving him or lending him $3500?

A. If he wanted to use the $1500 that way. I don't know. I should—what I should have done, maybe, is given the whole and he should have given it right back again.

Q. But he wound up with $3500 according to your testimony.

A. According to how—

Q. And gave you a $5000 note?

A. According to how he wanted it, that is how it was done.

Q. Did you get the two renewal notes and the Nazareth note from him at the same time? Was this all done at the same time?

A. Yes, that is right, yes, sir, including a paper—including a paper—which stated that it is collateral for Nazareth, Wales and Ambassador. The paper—

Q. Yes, you are referring, when you say—

A. He wrote it out himself.

Q. You say including the paper, you are referring to the original of what is Claimant Forman's Exhibit 6, is that right?

[fol. 3028] A. March 12, yes. That was it, yes, sir.

Q. Who made out the promissory notes?

A. Who made out the promissory notes?

Q. Yes.

A. Mr. Malakoff made them out. Can I see the notes?

Q. No. I want you to tell me without looking at the notes.

A. Without looking at the notes?

Q. Yes.

A. Surely, Mr. Malakoff made out the notes, it is his handwriting.

Q. He made out all three promissory notes at one time?

A. I think he did, yes.

Q. Where did he get the notes, the forms from?

A. He always had forms in his office. From his office.

Q. What is your recollection about that, did he have them on his desk? Had the notes been made out before you got there?

A. No, sir.

Q. They were made out in your presence?

A. Yes.

[fol. 3029] Q. All three notes were made out in your presence?

A. Including the paper.

Q. This paper was also made out in your presence?

A. Yes.

Q. Did Malakoff type the original of Claimant S. Forman's Exhibit 6?

A. Did he type?

Q. Did he type it?

A. I don't know what instrument he used in making up the paper. I don't remember.

* * * * * * *

[fol. 3052] Recross examination.

By Mr. Weinstein:

Q. Mr. Forman, do you have the checks in exchange for which John Malakoff gave to you this check to the order of Seymour Forman, agent, in the sum of $2000, which has been marked Claimant S. Forman's Exhibit 16?

A. I don't remember any of the records; I told you they were lost in the moving. I would give you all the records.

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[fol. 3054] Colloquy Between Court and Counsel

Mr. Seligson: If Mr. Rosen has no objection I would like to offer in evidence the specific questions and answers that Mr. Rosen read.

The Court: But they are in the record.

Mr. Seligson: But he denied he so testified.

The Court: All right.

Mr. Seligson: That is all right, we do not have to read them, but the questions that you read.

The Court: They will be received as a Debtor's exhibit.

(Deemed marked Debtor's Exhibit E.)

The Court: They will be received in this posture: All excerpts from claimant's depositions before trial, as to which he was interrogated at the trial.

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[fol. 3069] Direct examination of Harry Forman.

By Mr. Sanders:

Q. Mr. Forman, do you have the voucher or the cancelled check which you used in purchasing the first five shares of stock in March? What date was that?

A. 1953.

Q. March, what date?

A. I think it was around March 20th.

Q. March 20, 1953?

A. Yes, I do.

Q. Will you produce that check, please?

A. (Hands paper to counsel.)

Q. Mr. Forman, I notice you produce a check of Alwin Curtain Shop in the sum of $5000 made payable to John Malakoff. Is this the check you used to purchase the five [fol. 3070] shares of stock?

A. Yes, it is.

Q. Of John Malakoff?

A. It is.

Q. Of Nazareth Market?

A. That is correct.

Q. Did you at a subsequent date return this $5000 to Alwin Curtain Shop?

A. I did.

Q. Have you the cancelled check which indicates the return of that $5000?

A. I do.

Q. Would you exhibit that, please.

A. (Witness complies.)

Q. Check dated July 15, 1953, payable to Alwin Curtain Shop, in the sum of $5000?

A. That is right.

Q. Do you now say that this check, made payable to Alwin Curtain Shop, in the sum of $5000, which you signed, is the $5000 Alwin Curtain Shop advanced on your behalf for the purchase of five shares of stock of Nazareth Market?

A. Yes. I was short in money at the time and Alwin Curtain Shop—David Hochman, the proprietor, is a friend [fol. 3071] of mine, and I asked him to loan me the money for a short period of time. And Mr. Malakoff at that time wished that the check should be drawn to him. I explained to him that I would have to get this $5000 from this friend of mine and Mr. Malakoff asked that I have this friend draw the check payable to John Malakoff so tha he could certify it and get the money immediately. He always seemed to need money.

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[fol. 3078] Q. Do you remember the date in March when you had a conversation with Mr. Malakoff relative to the purchase of some five shares of stock?

A. It was around about March 15 of 1953.

Q. Let me show you a check, photostatic copy of a check No. 1423, made payable to Malakoff and signed by you, and see if this will better refresh your recollection with respect to the exact date of your conversation with Mr. Malakoff relative to the purchase of stock.

A. Yes. This was my first transaction.

Q. Will you give us the date?

A. Purchased March 20, 1953.

Q. Is that the date you had a conversation with Mr. Malakoff relative to the purchase of stock?

A. No.

[fol. 3079] Q. Or did this conversation precede, take place before that?

A. Conversation took place several days before the consummation.

Q. Will you tell us what was said, what you said to him and what he said to you relative to purchasing stock.

A. Mr. Malakoff, as I said, prior to the second purchase, he painted the picture of this Nazareth Market in very glowing terms and he told me the people were paying much more than $1200 a share for the stock, and that since he is a personal friend of mine, he would let me purchase this stock from Nazareth Corporation for $1200 a share. We finally agreed, and I purchased five shares—this was the first transaction—purchased five shares on March 20, 1953, and paid Mr. Malakoff $6000.

Q. Before you did that, Mr. Forman, will you tell us about what else Mr. Malakoff told you about the Nazareth Market and specifically with respect to dividends.

A. All right.

Q. If anything.

A. He told me two things. First, he was very reluctant [fol. 3080] to sell the stock because he knew that this stock, at least he felt, that is what he told me, that this stock would be worth a great deal of money. He is only selling it because he needed the money.

Mr. Rosen: If your Honor pleases, I have a standing objection in this case to personal conversations.

The Court: Yes, and it is overruled.

A. (Continuing) And on the occasion of the first purchase by me of these five shares Mr. Malakoff, as I said before, painted the picture very glowingly, and at that time said that he would guarantee personally that I would receive 20 per cent dividends if I would purchase these five shares of stock. I told him that it wouldn't be necessary for him to guarantee it personally; that since I was buying it from the corporation, if the corporation paid 20 per cent dividend that I will receive my share too and finally agreed to buy it.

Q. In connection with the purchase of these five shares of stock, did you have $6000 in the bank to purchase it with?

A. No.

Q. What did you do about raising that $6000?

[fol. 3081] A. I went to the Corn Exchange Bank and borrowed the money. As I said before—

Q. Wait a minute. How much money did you borrow?

A. $6000.

Q. What branch of the Corn Exchange Bank did you make that loan?

A. Astor Place branch.

Q. In connection with that loan was anything done by Mr. Malakoff and under what circumstances was that done?

A. Well, I said before that he was very reluctant to sell the stock, and when he proposed this to me, he asked me as a friend, and, remember, I told you he represented many, many clients and he helped me build a good insurance business, so I felt I owed him something. He didn't want to sell the stock, but he finally said that he would sell it to me but he would like an opportunity to buy it back. I wasn't adverse to that.

Q. What suggestion, if any, did he make?

A. Well, the suggestion we both made—he made a suggestion and we both concurred and agreed upon it. I was to borrow the $6000 in the Chemical Corn Exchange Bank. Mr. Malakoff was to assume the repayment of this $6000

[fol. 3082] at the rate of $500 a month. When he had paid back the bank the $6000, I was to give him back the stock.

Q. Were you to ask for any profit or any loss or anything like that?

A. No, the only thing he said to me, that during the interim, any dividend that would be declared for these five shares would belong to me.

Q. Did he restrict the rights of voting on that stock, if any?

A. No, no, because he said that these five shares belonged to me until such time as he will be able to repay that money.

Q. Now, Mr. Forman, have you the check of $6000 which was used for the purchase of the five shares of stock you have just referred to?

A. This is a photostatic copy of it.

Mr. Sanders: I offer the check in evidence.

Mr. Rosen: The only objection I have is it is not binding on the debtor corporation, not made out to the debtor corporation, and has no notation of any kind or endorsement or otherwise of the debtor having received it.

The Court: Overruled.

[fol. 3083] Mr. Seligson: No objection.

(Marked Claimant H. Forman's Exhibit 7 in evidence.)

Direct examination.

By the Court:

Q. Mr. Forman, this Claimant's Exhibit 7 is dated March 20, 1953, and appears to be a check drawn by you on your account at the Corn Exchange Bank and Trust Company, at Astor Place, for $6000 to John Malakoff. Did I understand you to say that this $6000 emanated from a loan which you made from the Corn Exchange Bank and Trust Company?

A. Yes, your Honor. The proceeds of that loan is that $6000.

Q. When did you make the loan? When was the loan credited to your account?

A. The loan—I have it right here, March 20, 1953, your Honor.

• • • • • • •

[fol. 3085] Direct examination.

By Mr. Sanders:

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Q. The five shares of stock, marked Exhibit 5, is that the five shares of stock that were delivered to you for the $6000? The certificate is marked as March 1953.

A. Yes, this is the one.

The Court: When you are through with that, may I see it again?

Mr. Forman, I address your attention to the fact that the certificate itself, on its face, is dated March 13, 1953, but the assignment on the reverse side thereof, purportedly to you and signed by Malakoff is dated March 17, 1953. With these dates in mind, can you tell us, if you do recall, when it was that this certificate actually came into your possession, and where, and from whom, and what were the other circumstances surrounding it.

• • • • • • •

[fol. 3087] The Witness: I took these 12 notes of $500 each to the bank on March the 17th. The bank thereupon started the wheels in motion to put through the loan of $6000.

The Court: Let me ask you this, did the bank discount Malakoff's notes on your endorsement?

The Witness: Yes, sir.

The Court: Or did they make an independent loan to you and merely accept Malakoff's notes for collection?

The Witness: They made the loan on the basis of his notes, which they discounted, which they discounted for me on my signature.

[fol. 3088] The Court: I see.

Q. Did Mr. Malakoff have an account in that bank?

A. No.

Q. Could Mr. Malakoff loan a nickel from the bank on his notes?

Mr. Seligson: Your Honor—

The Court: Just a moment, just a moment. The objection is sustained. But, in any event, my recollection is that most of the Malakoff checks were drawn on the Corn Exchange Bank. So, when you say bank, maybe you mean branch.

Q. The branch at which you made the loan of the $6000.

A. He was unknown there.

Mr. Seligson: One minute. What is the question?

The Court: Merely whether Malakoff had an account in the Astor Place branch.

Q. Your answer?

A. He was unknown there.

Q. Is it your testimony the $6000 that was credited to your account was a loan based on your signature all alone?

A. Only on my signature.

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[fol. 3091] A. Good. I pointed out before that Mr. Malakoff was reluctant to sell that stock. He and I figured out a way how he could sell me the stock and yet, after a year's time, he could get that stock back. The way we both figured it out was that way. He was to draw these 12 notes, I was to take them to the bank, discount them, get the $6000, give him the $6000, give him the opportunity to repay this money at the rate of $500 a month and, if he did, he was to get the stock back and I did not own it, but our understanding was that I was buying this stock at that time.

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[fol. 3097] Cross examination.

By Mr. Rosen:

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A. No. I have the evidence here to show that I made the loan, if you would like to see it.

Q. Yes, sir, if you have.

A. That I made the loan, and not Mr. Malakoff.

Q. Kindly produce it.

A. All right. Here is the original note which I signed for the loan for the Chemical Corn Exchange Bank to show that I made the loan and not Mr. Malakoff.

• • • • • • •

[fol. 3098] The Court: As I construe the document, he went in and he borrowed $6000 and he put Malakoff's notes up as "Collateral security." He gave his note for $6000 to the Corn Exchange Bank and he put up the Malakoff 12 notes as "collateral security." And you are asking this layman whether that constituted a guarantee or some other sort of transaction.

Q. Was it your understanding that you were guaranteeing the payment of these notes?

A. No, I didn't guarantee the payment at that time. I knew that shouldn't he pay I would have to pay. I was making the loan. I knew that.

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[fol. 3106] Q. I show you Claimant H. Forman's Exhibit 6 and ask you, doesn't that stock on its face first show that it was issued at John Malakoff and then transferred to you?

A. That is correct.

Q. Did you see that when you received the stock certificate?

A. Yes, I did.

Q. Did you make any comment about it?

[fol. 3107] A. None whatsoever.

Q. Similarly, Claimant H. Forman's 5, you note that that stock certificate bears the notation that it was first issued to John Malakoff and then purportedly transferred to you; is that correct?

A. That is correct.

• • • • • • •

[fol. 3109] Q. When you made out your checks, you made them out to John Malakoff personally and when you received Claimant's Exhibits 5 and 6 and saw that they were

in the name of John Malakoff originally, did you make any investigation to ascertain whether these certificates were properly issued and the consideration paid to the corporation?

A. I didn't think it was necessary.

Q. Was there any agreement between you and John Malakoff that if he repaid the $5000 on this Alwin Curtain Shop situation that John Malakoff would also receive back Claimant H. Forman's Exhibit 6?

A. No.

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[fol. 3197] Direct examination of
Herbert Danciger.

By Mr. Franklin:

Q. Thereafter did anything transpire with reference to this leasehold and the representations that John Malakoff had made to you?

A. Yes.

Q. Will you please tell the court what happened in that [fol. 3198] regard?

A. Rents did not come in like they were supposed to through the mail when they were due. I also learned that the rents actually being paid were not as represented and what they were supposed to be. I also learned that some of the tenants were ready to move out because they could not even remain in business or pay the rent, whatever they were. I also found that in order to try to get the rents, instead of them coming through the mail you would have to go chasing after the tenants to collect them. I also found I believe that taxes were in arrears rather than being paid up to date.

As I recall all these things added up to nothing like he originally stated this was.

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[fol. 3200] Finally he said, look I will buy it back from you at exactly w at it cost me. I said, fair enough. He then said to me but he does not have the money to pay for it, he would give me immediately—he would give me—

Q. Do you want to refresh your recollection?

A. I think it was a check. Yes, a check. And he paid for the repurchase of this property with a payment of 12 post-dated checks.

Q Totaling how much, Mr. Danciger?

A. Totaling about—well, about $12,000.

Q. About $12,000?

A. About $12,000.

Q. Mr. Danciger, I show you an agreement dated the 18th day of March, 1953, between Herbert Danciger and Melvin F. Danciger and John Malakoff, and signed at the end thereof by John Malakoff and Herbert Danciger (handing to witness), and ask you if this is the agreement to repurchase your interest in the Roslyn Heights property?

A. Yes.

• • • • • • •

[fol. 3201] Q. When you deposited the first check what happened?

A. It was returned, account closed.

Q. Do you recall approximately when that check was dated?

A. April 18, 1953.

Q. What did you do when this first check was returned?

A. I immediately contacted Malakoff and apprised him of the situation, and I went to see him.

Q. And what did he say to you and what did you say to him?

A. Well, he told me that he had closed the account for business reasons and had opened it in another bank, and that he would give me in exchange for checks what he called accelerated notes on the new bank where he had opened an account.

Q. When was the first note of this new series of notes payable?

A. I believe it was a few days later, the first one due April 22nd.

[fol. 3202] Q. Did you deposit that note?

A. I did.

Q. What happened when you deposited that note?

A. It was returned insufficient funds.

Q. Did you speak with John Malakoff concerning this?

A. I immediately went to see him and told him I was going to take advantage of the acceleration notes and demand everything with all the notes. So at his insistence he gave me a check to replace the first note, which came back insufficient, and gave me 11 shares of—he gave me I think it was 11 shares of stock as collateral in the Nazareth Corporation for the balance of the notes.

Q. The balance of those notes were $10,946.97; is that right?

A. Yes.

• • • • • • •

[fol. 3230] Cross examination.

By Mr. Rosen:

Q. I show you Claimant Danciger's Exhibit 12 and, irrespective of your remembering the exact date, in so far as the sequence of events that you have testified to, will you kindly tell me when you received Claimant Danciger's Exhibit 11? Tie it in with the particular event that you have spoken of.

A. When or how, is your question now? Because in the beginning of your question you said "not remembering the exact date".

Q. I said, with the event.

A. With the event I can tell you. When Mr. Malakoff replaced the checks on the bank—his account was closed—with notes, accelerated notes, the first note, upon presentation, came back marked "insufficient funds." I saw him about this. I believe he visited the bank with me to make it good. We returned to his office. I don't recollect now whether it was upon his giving me the notes originally or after the first note had come back marked "insufficient funds" that I told him that I was going to take advantage of the acceleration clause in the notes, that he gave me this [fol. 3231] stock certificate as collateral for the notes.

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[fol. 3386] Cross examination of
Harry Forman, resumed.

By Mr. Seligson:

Q. What does it say?

A. It says "Corn Exchange Bank, first payment of 5000 loan Hochman," which to me means the first payment that I made to the Corn Exchange Bank towards the $5,000 loan which I took from Hochman.

By the Court:

Q. You borrowed $5,000 from Hochman and you paid it back by paying the Corn Exchange Bank?

A. No. I borrowed $5,000 from Hochman and then borrowed $5,000 from the bank and repaid it to Hochman in one lump sum, and then returned it to the bank at the rate of $250 a month, and indicated on the stub that this $250 that I was paying back on that $5,000 loan was to Hochman, $5,000.

Q. Well, now, will you look at Claimant's Exhibit 4, please.

(Exhibit is handed to the witness.)

Q. That is the check, is it not, for $5,000 dated July 15, 1953 from you to Hochman's company, the Alwin Cur-
[fol. 3387] tain Shop?

A. That's right.

Q. Is that the repayment that you spoke of?

A. Yes, sir.

• • • • • • •

[fol. 3674] Cross examination of
Arnold A. Weinstein, resumed.

By the Court:

Q. Mr. Weinstein, so long as we are speaking of impressions, as a lawyer who drew that agreement, can you
[fol. 3675] give me an idea of what impression you think somebody might get reading the second paragraph? Notice the second paragraph of that document.

A. I would say, your Honor, that if anybody read this second paragraph standing alone he would not be receiving a proper understanding of the document. I think that in order to understand the second paragraph, as your Honor points out, I think it would be necessary to read the entire Claimant's 4—3, rather.

Q. Mr. Weinstein, I think you understand me. Leaving out the fact that there was indecision at that time as to what future form the enterprise would take, I ask you as a lawyer who drew that document what you believe any reasonable person would get, what impression they would get, as to the ownership of a venture by reading the second paragraph in the language that you coined.

A. The impression that somebody would get, your Honor, is that John Malakoff had had all of the stock issued to him and that he owned it.

Q. And that he was selling it, is that right, in some form?

A. Yes, sir.

Q. But am I to understand your testimony to be that, [fol. 3676] notwithstanding the employment of that language in that agreement, the impression that you got from John Malakoff was different?

A. Yes, sir.

• • • • • • •

[fol. 3681] Cross examination.

By Mr. Ros n:

Q. Yet you tell the Court of impressions that you had that this was a promotion and John Malakoff, in fact, in real fact, did not own all the stock but this was merely a modus operandi to carry through a promotion, is that true?

A. The check—yes and no—the check was made payable to John Malakoff because I didn't know at that time that I was definitely buying any corporate stock at that time. The chances were one way or another. I may have been buying corporate stock on the one hand; on the other hand I may not have been buying any interest in a corporation at all but, rather, one in a limited partnership.

• • • • • • •

[fol. 3684] Q. Who suggested—who raised the first issue about how this venture was to be operated?

A. John Malakoff did.

• • • • • • •

[fol. 3690] Q. Am I to understand, Mr. Weinstein, that when you prepared Claimant Weinstein's Exhibit 3 you were representing John Malakoff; you owned no stock in this corporation; you were endeavoring to protect John Malakoff as your client?

A. Representation is a difficult word. I have outlined the basis upon which I drew that exhibit. It was based upon information that he gave me and represented an attempt to accommodate to a dichotomous situation.

• • • • • • •

[fol. 3692] Q. Were you asked these questions and did you give these answers:

"Q. Did Mr. Malakoff tell you he was selling you stock that had been issued by the Nazareth Fair Grounds & Farmers Market, Inc. or that he was selling you original issue of corporate stock?

"A. He said neither.

"Q. What did he say that he was selling you?

"A. He was selling an interest in this venture in Nazareth, and the form of the investment was left substantially up in the air pending a determination as to whether or not the best way to be conducted, in the form of a corporation or a limited partnership."

A. I said that.

Q. Is that true, according to your present recollection?

A. Yes.

Q. Are you testifying that statement is true notwithstanding the statements in Claimant Weinstein's Exhibit 3 and Claimant Weinstein's Exhibit 6, in which purportedly [fol. 3693] it says that all of the stock is issued to John Malakoff?

A. That is correct.

Q. Was it your understanding that Mr. Malakoff was to keep these moneys that you gave him, the sum of $7,000?

A. No, sir.

Q. What was your understanding?

A. My understanding was that this was supposed to be used in the venture itself, for the venture itself; that I was not giving this money to John Malakoff personally.

Q. Have you ever done any work for John Malakoff, Nazareth Fair Grounds & Farmers Market, Inc. or any firm connected with John Malakoff or Helen Bernstein, other than what you have testified to?

A. No.

Q. Have you had any kind of transactions of any nature or nature with Helen Bernstein or John Malakoff other than what you testified to?

A. No.

• • • • • • •

[fol. 3706] Cross examination.

By Mr. Robbins:

Q. Do you remember whether you talked about this form of organization of the venture with John Malakoff and [fol. 3707] whether John Malakoff told you anything about what his knowledge of various forms of real estate ventures was?

A. He told me in substance that he had received some advice, that the advice revolved around a particular method of operation which would be best suited under all of the circumstances, that it was a question of operating this thing through a corporation or through a partnership or limited partnership or something of that nature. And when he started the conversation off with that I recall that I interpolated something to the effect that obviously in the case of a partnership or a limited partnership he would avoid the impact of double taxation in the form of a corporation.

• • • • • • •

[fol. 3712] Q. What you did was to draft this letter.

A. That is right.

Q. If I understand you, are saying that you had no responsibility and, for that matter, no interest in the form

that the organization would take in the future or the form it was in even at that time.

A. At the time that I drew that letter I had no interest at all.

Q. You were simply serving as a draftsman based on [fol. 3713] certain information and concepts that were given to you by John Malakoff?

A. That is right, and also concepts that I developed as a consequence of the conversation.

• • • • • • •

[fol. 3775] Cross examination.

By Mr. Seligson:

Q. Now in the course of your conversation with Malakoff about the advantages of a corporation and a partnership, weren't you told that a corporation known as Nazareth Fair Grounds & Farmers Market, Inc. had been organized?

A. He mentioned the name of a Nazareth corporation. I made no notation of it. But I do recall that I translated that on to my proposed draft as the name that appears on it, Nazareth Farmers & Auction Market, or something to that effect.

Q. Did he tell you that he was the sole stockholder in this corporation?

[fol. 3776] A. He did not. He indicated to me, and I think I am rather certain about this, he indicated to me that the stock was going to be issued to him because he did not want to get the SEC on his neck in the event that he gave these stock certificates to so many different people.

Q. Didn't he tell you that he had been selling participation interests in this market to other people?

A. He mentioned that he had sold interests to other people.

• • • • • • •

[fol. 3844] ESKANDER MANOOCHEHRIAN, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sidney Bush:

• • • • • • •

[fol. 3848] A. Yes, on November 14, 1952 I had some discussion with Malakoff in regards to a deed that he had bought or he was buying on 69th Street, a piece of property on the East Side, and he told me at that time that if I give him $20,000 that it will make the deal very much [fol. 3849] possible and that he will be put me in this deal for my money.

At that time, he give me this. I agreed to give him the $20,000 but he owed me $5,000 from the previous $10,000. He came down from his office with me. We went forth to the Irving Trust Company, at which place I had my bank account, and I believe he had—he took a $5,000 check, gave me right in there. I put it in my account. That made it possible for me to give him a $20,000 check.

Q. Is this the check drawn on your account, the Irving Trust Company, to the order of Wales Properties, Inc. dated November 14, 1952?

A. Yes, sir.

Q. Which you spoke of?

A. Yes.

• • • • • • •

[fol. 3851] Q. On December 10th did you have a meeting with Mr. Malakoff and discuss with him the repayment of the $20,000 and then did you come to some understanding which is evidenced by this memorandum?

A. Yes, I did. I met with him and I arranged with him to pay my money back in, I believe, seven installments of $2,857.14.

Q. Did Mr. Malakoff give you a memorandum?

A. He did.

Q. Is that his signature?

A. Yes.

• • • • • • •

[fol. 3852] Q. Mr. Manoochehrian, did you receive any of these weekly payments mentioned in this last exhibit?

A. I received two of the payments.

Mr. Seligson: How many?

Q. Will you tell us when—

The Witness: Two of the payments.

Q. Will you tell us when and in what amount?

A. One was December 1, 1952 for the sum of $2,857.14.

The Court: Wait a minute. The agreement was dated December 10.

Q. You have before you some other documents, if you have any doubt. Look at your records, please.

A. Just a moment.

December 17, the first one was $2,857.14, December [fol. 3853] 17.

Excuse me for the—

The Court: That's all right.

A. (Continuing) And the second one was December 26, $2,857.14.

Q. Did you receive any of the other payments?

A. I did not.

• • • • • • •

[fol. 3854] The Court: Oh, I see. All right, you go ahead now. Now we know you are holding a series of checks and two of them were deposited. The first and second ones of them cleared?

The Witness: Yes, sir.

The Court: When you were about to deposit the third one, he called you up?

The Witness: Yes, sir, and he said not to deposit it, that there is no money. At the time I went back and forth [fol. 3855] to him and there was no use, he didn't have the money, and he told me not to put the money in.

Q. Put the checks in, you mean?

A. Not to put the checks in. I became worried about my money and—

Q. Did the subject of the Nazareth Fair Grounds & Farmers Market arise at that point?

A. Yes.

Q. About when was this?

A. I believe that it was some time in the beginning of '53, where he told me that he has the Nazareth Fair Grounds & Farmers Market, of which I had heard before, and that he would like, instead of my balance of my money, to give me shares of this thing that he owns.

• • • • • • •

[fol. 3858] Q. Will you tell us the substance of the conversation, if you recall?

A. The substance is that he did not have any money and that he would want to give me stocks of Nazareth Fair Grounds and Farmers Market instead of my money. And there were—he kept telling me that the stocks were being transacted for $1,000 apiece. I did not question it at the time. And finally it resulted in his giving me 14 shares of stock.

Q. I show you this stock certificate No. 36 for 14 shares dated February 2, 1953 and ask if this is the certificate he delivered to you?

[fol. 3859] A. This is it, sir.

• • • • • • • •

[fol. 3968] Cross examination.

By Mr. Rosen:

Q. I show you three checks, one dated November 6th, the other November 12, the other November 14. The November 6th check was for $2,500, to Eskander Manoochehrian, signed John Malakoff; check of November 12, $2,500, to Eskander Manoochehrian, signed John Malakoff, agent—both are "agent"—and another check dated November 14, 1952 for $33.33, signed John Malakoff, agent, and ask you whether you received these three checks?

A. I did.

Q. And you received the moneys therefrom?

A. Yes.

• • • • • • •

[fol. 3990] A. Malakoff gave me that in April when I received the six shares and for his own reason put that date of the 14th of November. I received that paper—

Q. Did he tell you the reason why he put November 14, 1952 in April?

A. He did not; I don't recall having heard it.

Q. Have you had this receipt in your possession—I am talking of Claimant Manoochehrian 10—in your possession from the time you received it until the present time?

A. From the time I received it.

Q. There was no change made by you or anybody on this receipt from the time you received it, was there?

A. Definitely not by me.

Q. And you claim that this receipt—

The Court: May I interrupt a moment?

Mr. Rosen: Surely.

Cross examination.

By the Court:

Q. Do you have a recollection as to which bank you went to when this transaction took place, Mr. Manoochehrian?

[fol. 3991] A. Which transaction, sir?

Q. Where he gave you the $5,000?

A. Yes, the Irving Trust Company.

Q. The Irving Trust Company?

A. Yes, sir.

Q. And that was—

A. On November 14th, he came down with me.

Q. You see, I told you not to volunteer information and now you do.

A. I am sorry.

Q. Was it November 14th or was it April?

A. When he came down and paid the $5,000 in the bank was November. When I made the loan to Malakoff, the $20,000 loan.

Q. Then it was in April that you got the stock certificates?

A. Yes.

Q. And it was in April that you claim you got the letter—

Mr. Rosen: Claimant Manoochehrian 10, your Honor?

The Court: Claimant Manoochehrian 10, despite the fact that it was dated November 14, 1952.

The Witness: Yes, sir.

• • • • • • •

[fol. 3993] Cross examination.

By Mr. Rosen:

Q. The difference between the $16,000, which is the receipt that you got from John Malakoff, and the 14,285.82 which you claim was the actual balance due, what was that, a bonus?

Mr. Bush: Objection, your Honor.

The Court: Overruled.

A. I frankly, Mr. Rosen, do not recall. This paper was given to me by Malakoff. There was no question of bonus there, and I have testified to that before.

Q. Mr. Manoochehrian, we have it that there was only due you 14,285.82, is that correct?

A. That is correct.

Q. And you took and accepted a receipt and kept the receipt from John Malakoff for $16,000, is that correct?

A. He made this thing and gave it to me.

Q. I say you received it, accepted it, you didn't ask that [fol. 3994] it be corrected, amended or changed; isn't that so?

A. (Witness nods head.)

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[fol. 4913] Frederick Katzenell, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Robbins:

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[fol. 4915] Mr. Robbins: Your Honor, at this point, before proceeding further, I would like to explain the proce-

dure that I want to follow in this case, subject, of course, to the Court's approval.

Mr. Katzenell's claim to the Nazareth stock rises from an agreement with John Malakoff on September 4, 1951 whereby he acquired 50 shares of stock at that time for $30,000. Most of the $30,000 represented an antecedent debt which we intend to prove, and I would like to offer a [fol. 4916] stock certificate and—to offer the stock certificates and this basic letter and check at this point, and then prove what lies behind it in chronological order up to September 4, if I may.

• • • • • • •

[fol. 4918] Q. Now, Mr. Katzenell, this letter refers to receipt of $30,000 by John Malakoff from you. Did you give John Malakoff $30,000?

A. Yes, sir.

Q. When did you give him the money?

A. On September 4, 1951 I gave him a check for a balance of $2,000 which he marked, balance, total received $30,000. Previously I had dealings with him and the moneys which I had invested with him he did not repay me, but he had it with him. So it piled up the amount up to this amount.

Q. All right. In other words, you are saying that you gave him $2,000 on September 4 and he owed you an additional $28,000 at that time?

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[fol. 4981] Q. What happened next on this deal, Mr. Katzenell?

A. And the deal was actually bought by—the deal was bought and it was bought in my name.

Q. Were you present at that closing?

A. I was only present at the time when the contract was signed.

Q. Where was it signed and when?

A. It was signed, I think, in January, some time in January, 1951, and it was in the office of Mr. Liebowitz, Jacques Leibowitz, because his sons were the sellers, and I give at that time—I gave a check for $2,500 to Mr. Bernard Mar-
[fol. 4982] golis, for $2,500, and I had a 50 per cent in-

terest in this contract, because there was 7000 put up on contract, a thousand dollars which I paid previously and the $2,500, which makes $3,500, and the total deposit on contract was $7,000, but if I recall well, Mr. Margolis, who was the attorney on this—

Q. This check is drawn to the order of Bernarold Margolis. Is that your handwriting?

A. That is right. At that time—

Q. Who was Bernard Margolis?

A. I, at that time, I didn't know Mr. Benjamin or Bernard, because I didn't know Mr. Margolis. I only know him once or twice. So I made the name Bernard Margolis.

• • • • • • •

[fol. 4984] Q. Of the payees?

A. That is what I said before. One is Robert Leibowitz and Lawrence Leibowitz for $6,000. One is Hampton Homes, Inc. for $1,000, totaling $7,000. That was the amount paid on deposit for this deal.

Q. Do you know who the principals were in Hampton Homes, Inc.?

A. Yes. It was the corporation of Mr. Robert and Lawrence Leibowitz.

• • • • • • •

[fol. 4986] Q. Do you know anything about these checks? Do you remember anything about these checks that you signed?

A. I remember that it was the return of $7,000. $7,000.

Q. Yes.

A. And then there was a check for profit which I don't know, I don't recall, $10,000, $12,000 or $14,000.

• • • • • • •

[fol. 4987] Q. What was the conversation?

[fol. 4988] A. He told me to leave the money with him.

Q. Yes.

A. For future deals. He said, "You don't need the money, I know, Fred. You have enough money and you made a profit with me already and you know I am honest and I don't run away."

I say, "It is all right, John, whatever you want, you will give it to me." I had full confidence.

Q. When if ever did you get a return on this Blossom and Saul deal in your hands?

A. September 4 when I purchased a quarter interest in the Nazareth Market; all those amounts due to me, which I had in a small notebook, I sit down and figure out everything what was due me, and I take the balance and so we wipe out—

Mr. Rosen: If your Honor please, I move to strike out all this story of what was said. That isn't the question.

(Last question read.)

The Court: Will you answer that, please? When did you get back the $3500 from the Blossom and Saul deal?

The Witness: It has been adjusted to purchase stock [fol. 4989] in Nazareth Market.

Q. That would be on September 4?

A. Yes.

• • • • • • •

[fol. 5009] Q. Incidentally, Mr. Katzenell, do you have any record in that book that we have marked Exhibit 7 or elsewhere as to your profit in this transaction, the Clifton transaction?

A. No, I don't have.

Q. This is just your own recollection?

A. Because in 1950—

Q. Never mind because.

The Court: Just answer the question. You are basing it on your recollection, is that right?

The Witness: That is right.

Q. Let me ask you one more thing, Mr. Katzenell: There is another check here dated May 23, 1951, which has something on the back, Clifton deal. Whose handwriting is that Clifton deal?

A. That is my handwriting.

Q. Now, is this check related to this Clifton transaction you have been describing and to the check dated January 24, 1951, which we have marked Exhibit 30?

A. No, that was a different Clifton deal.

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[fol. 5110] Q. Suppose I were to tell you, Mr. Katzenell, that Mr. Kanter had testified that he received some money back on the East 3rd Street deal. Would that make any difference in your testimony?

A. I don't see that I got any money. I can't. What another business has done, on another participant, it doesn't apply to me.

• • • • • • •

[fol. 5111] The Witness: I say, I do not see that I have ever received any money back on this 3rd Street deal; what another participant has done or received doesn't necessarily apply to me.

Q. Mr. Katzenell, I want to show you a check which is dated September 25, 1951 and is a part of an exhibit which was received in the Charles Kanter claim as Debtor's Exhibit E. This is a check in the sum of $1609.50.

A. Yes.

Q. By John Malakoff to Charles Kanter.

A. Yes.

Q. Now, do your records indicate any receipt by you of a similar amount on a similar date from John Malakoff?

A. Yes. I have a deposit slip showing that I received $1609.50.

Q. When?

A. On September 25, 1951.

Q. From John Malakoff?

A. Yes.

• • • • • • •

[fol. 5225] Q. Mr. Katzenell, you were saying something about December 15, 1950.

A. Yes.

Q. What was that?

A. December 15, I had through a friend of mine procured $7500 for Mr. Malakoff.

• • • • • • •

[fol. 5232] Mr. Robbins: I offer this check in evidence, your Honor.

The Court: Now, wait a minute. Whose check is it?

Mr. Robbins: It is from Simon Rosenkranz to John Malakoff.

The Court: Well, how does that become his transaction without proof?

Mr. Robbins: All right.

The Court: I am not going to take that in evidence. It is a third party altogether. There is no connection between them so far.

Mr. Robbins: All right.

The Court: Who is Simon Rosenkranz?

The Witness: Simon Rosenkranz is a friend of mine.

• • • • • • •

[fol. 5246] Q. Well, did you get that money back, Mr. Katzenell, the $5000?

A. No.

Q. Did you receive any part back?

A. No. It had been applied to—later on I purchased the property.

[fol. 5247] Q. You purchased what property?

A. Ocean Parkway.

Q. Now, you say this $5000 was applied to the purchase of the Ocean Parkway property?

A. Yes.

Q. And not to the Nazareth deal, is that right?

A. That is right.

• • • • • • •

[fol. 5299] Q. Were there any further advances by you to John Malakoff or Helen Rothschild on the Ocean Parkway deal?

A. I just see a small check there for $150 or $151 on July 10 to John Malakoff for some adjustment on Ocean Parkway.

• • • • • • •

[fol. 5329] Direct examination.

By the Court:

Q. What happened?

A. In September 1952 I had been called to the District Attorney's office.

Q. What District Attorney's office, New York County?

A. New York County.

Q. Yes.

A. And I had been questioned there—

Q. Yes.

A. —regarding some—regarding the property on Ocean Parkway, how I acquired the property on Ocean Parkway, from whom and how I paid for it. I brought all the documents up to the District Attorney's office. He checked it. But it was already in August—when I had been there—it was just a month later—a month later—that I sold it. I had it already sold.

Q. Just a minute. You had been where in August?

A. In August I had been, on the 29th of August, I had been to the office of the District Attorney.

[fol. 5330] Q. I thought you just told me it was in September you went to the District Attorney?

A. I have here—

Q. All right. Let us start from the beginning. What happened in August? You went to the District Attorney what time in August?

A. August 29, 1952.

Q. During the month of August you got $500 from Malakoff, didn't you?

A. Yes.

Q. You say that in September, after you visited the District Attorney's office, you had a conversation with Malakoff?

A. In September?

Q. Yes.

A. Yes. In the beginning of September.

Q. In the beginning of September. Where?

A. In his office.

Q. What did he say and what did you say? Who was present?

A. Mr. Malakoff and Miss Bernstein.

Q. What was said?

A. Can I not continue what I wanted to say?

Q. No, you will answer my question. What was said at [fol. 5331] the conference in September, the early part of September?

A. That he has—he has given me a check for the dividend

and I should not be afraid; what I heard in the District Attorney's, this is not so. He tried, because I had some fears, and I expressed those fears—

• • • • • • •

[fol. 5415] Direct examination.

By Mr. Robbins:

Q. Did John Malakoff ever tell you what the total return was on the investment in the Blossom & Saul deal?

A. He told me that the profit was $9,000, and the investment, the return, the money deposited on the contract was $7,000, and the profit was supposed to be $9,000. Nine and seven would be sixteen. I see it is 19 here, which I have been cheated.

Q. Well, John Malakoff said that the return was $9,000?

A. The profit.

Q. The profit, rather.

A. Yes.

Q. And what was your share of that profit?

A. 50 per cent.

Q. Did he say?

A. 50 per cent.

Q. So you were entitled $4500 profit plus the return [fol. 5416] of your $3500?

A. Right.

• • • • • • •

[fol. 5454] Cross examination.

By Mr. Rosen:

Q. When you were testifying on pretrial examination on September 2, 1958 were you asked these questions and did you give these answers, page 5:

"Q. Are you testifying from a book and record?

"A. From my memory and from the book. I'm helping myself if I can't—

"Q. Is this book and record that you are refreshing your recollection from—

"A. Old.

"Q. —a record kept in the regular course of your business?

"A. Please, will you ask me again? I can't follow.

"Q. Is this book and record a record that you kept in the regular course of your business?

"A. At that time, yes, I kept it.

"Q. Was this the book you were speaking of when you were being examined before trial by me? I am talking of Claimant's 7?

"A. Yes, Mr. Rosen.

"Q. It was in your own handwriting that you kept it?

[fol. 5455] "A. That's right.

"Q. From day to day, week to week, month to month and year to year?

"A. I kept it only with Malakoff, with, say, for the beginning of my transactions. Then, when I trusted him, I just didn't continue to keep records.

"Q. Can you let me have the book, please?

"A. Sure.

"Mr. Rosen: I ask that this book be marked for identification, please.

"(Ledger book marked Debtor's Exhibit 1 for identification.)"

And this ledger book marked Debtor's Exhibit 1 is presently Claimant's Katzenell Exhibit 7, correct?

A. Yes.

Q. "The Witness: This is something which is not pertinent to this business.

"Mr. Rosen: Off the record.

"(Discussion off the record.)

Q. "Q. I show you Debtor's Exhibit 1 marked for identification and ask you whether except for Debtor's Exhibit 1 for identification did you keep any other books and rec-

[fol. 5456] ords or ledgers as to your transactions?

"A. No."

Were you asked those questions and did you give those answers?

A. I don't recall, Mr. Rosen. I don't remember.

Q. I said, were you asked those questions and did you give those answers?

A. I don't know.

Mr. Rosen: If your Honor please, may I please mark into the record the pretrial examination, the questions and answers that I have—

The Court: You have already got them in the record, Mr. Rosen. How else do you want to mark them?

Mr. Rosen: The witness testified he doesn't know, I want to show they are actually part of the record.

The Court: That you have already read them into the record.

Mr. Rosen: And that I have read them correctly.

The Court: Well, I don't know whether you have or not. [fol. 5457] I assume that as a member of the Bar of this court you wouldn't deliberately misread anything.

• • • • • • •

[fol. 5467] Q. Now, on the examination of Mr. Menin that I referred to again, on the question of this book, on page 78 were you asked by Mr. Menin the following questions:

"Q. Now, let's stop here for a minute. Will your books indicate that you paid Malakoff $30,000—

"A. Yes.

"Q. —for the Nazareth stock?

"A. That is right.

"Q. Your books will show that?

"A. And if it doesn't show, I will make that for you."

Were you asked those questions and did you give those answers?

A. Yes.

• • • • • • •

[fol. 5503] Q. Yes, sir. Now, Mr. Katzenell, you gave Mr. Malakoff $750 by Claimant's check, Claimant's 84, on September 19th, 1950; correct?

A. Yes.

Q. And you have produced a note in court; Claimant Katzenell's 85, dated September 25, payable November 30, 1950, for a thousand dollars, is that correct? Is that right?

A. I beg your pardon? Pardon? You said I have produced a check for 750?

Q. That is right, sir. And a note, Claimant Katzenell's 85, for a thousand dollars.

A. Yes. This has nothing to do with me, this thousand [fol. 5504] dollars. And this $750 that must reflect here somewhere. Let me find it out. 750—and it says, referring—

Q. There is nothing here about the 750. The 750 merely shows money given and paid back. There is nothing here on this note of a thousand dollars, is that correct?

A. That says nothing.

Q. There is nothing here on this item, 750?

A. It doesn't say.

Q. But you received this note from Mr. Malakoff to your own order for a thousand dollars?

A. Yes.

Q. And I am referring to Claimant Katzenell's 85.

A. 85, yes.

Q. This note was in payment of the $750 for which had no notation of what it was for—

A. No.

Q. —which you gave on—

A. No.

Q. —on September 19th?

A. At that time, at that time definitely I did not give $750 for something which I did not know what it is for and [fol. 5505] I received this note. This note is for something else which Mr.—when I gave it to Mr. Rosenkranz, then Mr. Rosenkranz must have given the money for that.

Q. No, Mr. Katzenell. The note was given to you.

A. Yes.

Q. Not to Mr. Rosenkranz.

A. Mr. Rosenkranz didn't—

Q. I say, the note was given to you.

A. That is right.

Q. Didn't you testify that you received this note from Mr. Malakoff for money that you gave him and that you discounted this note with Mr. Rosenkranz?

A. I don't think so.

Q. Mr. Katzenell, did you get $250 interest from Mr. Malakoff on the $750 item that you gave him?

A. Definitely no.

Q. You don't know what the $750 you gave him was for?

A. If it doesn't say on the check, I don't know.

Q. And you don't know what you received this note, Claimant Katzenell's 85, for?

[fol. 5506] A. I have a faint idea, but you want to have another certainty so therefore I can say no. But if you allow me to express my view then I can tell you.

Q. Is it merely opinion—

A. Opinion.

Q. —or knowledge?

A. An opinion, not knowledge, not a hundred per cent.

Q. So you don't know what you received this note—

A. Definitely no.

Q. —Claimant's 85 for?

A. I definitely know that it was only to Mr. Rosenkranz for something which he has given to me to give to Mr. Malakoff and for which I brought him back a note.

Q. Mr. Katzenell, have you testified in this court that Mr. Rosenkranz merely acted, and when I say "this court" I am not talking about this trial—

A. Yes.

Q. —that Mr. Rosenkranz merely acted as your agent and your dummy and that all the money that Mr. Rosenkranz gave to Mr. Malakoff came from you?

[fol. 5507] A. A hundred per cent not true.

Q. You did not so testify?

A. I did not so testify. And in the pretrial examination you said so, if it is true, and I say no, which I have afterwards proven that it is not so.

Mr. Rosen: Will your Honor excuse me just for a moment, please.

Q. On page 274 were you asked the following questions on your direct examination, held on September 8th, 1958:

"Q. Wasn't Mr. Rosenkranz merely a dummy for you, just to handle your transactions? He has no money of his own, really, to pay out and loan; is that correct?

"A. No, he is a wealthy man, but he acted in 1952, he acted for me because he collected $3600 which I owed him, not Mr. Malakoff, he collected it for me, or he advanced me money.

"Q. You mean Mr. Rosenkranz gave you money for the note for $3600?

"A. Yes.

"Q. As a matter of fact, he gave you—

[fol. 5508] "A. No, after he collected it he gave it to me.

"Q. So that wherever Mr. Rosenkranz's name appears and your name appears on any one of your transactions, that was a situation where Mr. Rosenkranz acted as a dummy for you?

"A. I wouldn't call it as a dummy. He has done me a favor.

"Q. The word 'dummy' means somebody is merely acting for you?

"A. Oh, I see. Yes, sir, it is correct."

A. It is correct.

Q. Were those questions asked and did you give those answers?

A. But—

Mr. Robbins: Objection.

A. But it has a completely different meaning.

The Court: Strike out the answer.

(To Mr. Robbins) Why?

Mr. Robbins: All this testimony seems to refer to the note of 1952 and not the note that we were discussing previously of 1950. I don't think there is any inconsistency between what the witness has testified to and what this par-

[fol. 5509] ticular portion of the deposition refers to.

Mr. Rosen: I will read, your Honor, where it says:

"On any one of your transactions where Mr. Rosenkranz"—

The Court: Overruled.

Q. As a matter of fact didn't you even testify that you gave Mr. Rosenkranz the $5000 which he purportedly gave to Mr. Malakoff?

A. Which 5000?

Q. The $5000 which was part of the transaction involving eight thousand some-odd dollars.

A. You mean the $7500.

Q. 7500.

A. The check of 7500.

Q. Yes, Mr. Katzenell.

A. I took the check from Mr. Rosenkranz because—

Q. I didn't ask you that. I asked you didn't you testify that you gave Mr. Rosenkranz the $5,000?

A. No, I gave him—I produced one check that I gave, $2,875, towards this loan.

Q. Page 276, and you notice we are examining on Mr. Rosenkranz, Mr. Katzenell?

[fol. 5510] A. Yes.

Q. Is that correct? I say, were we examining on Mr. Rosenkranz?

A. It speaks about those checks of $3600.

Q. That is right. Is that right? Were you asked this question and did you give this answer:

"You didn't give him the $500?

"A. As far as I can recall, yes, I think, I believe that I gave them my money."

A. Yes, my money. But how much? $2,875.

Q. "You didn't give him the $5000"—was this the question? Look at it.

A. Yes, I see it.

Q. And what was your answer?

A. I think I gave him some money.

* * * * * * *

[fol. 5563] "Q. Do you recall testifying and handing over all the checks to Mr. Menin in response to his question, answering 'These are the checks that I made out to Malakoff disregarding for whatever they were because I had with him an account, and whatever checks he asked me I gave him'?

"A. That's right."

* * * * * * *

[fol. 5569] "A. On May 10th, Mr. Malakoff invited me to take part in a deal of Nazareth Farmers Market.

[fol. 5570] "Mr. Robbins: When?

"The Witness: May.

"Q. What year?

"A. May, 1951.

"Q. Yes, Mr. Katzenell, what did you do?

"A. He told me that he bought a quarter interest from his nephew in Philadelphia and I gave him a check for $2,500.

"Q. Representing what? What was the conversation?

"A. For representing a quarter of his quarter.

"Mr. Rosen: The witness admits check for $2,500 dated May 10, 1951, to the order of John Malakoff. I ask that it be marked.

"(Check dated May 10, 1951 in the sum of $2,500 to the order of John Malakoff was marked Debtor's Exhibit 30 for identification.)"

Now were you asked those questions and did you give those answers?

A. Yes.

Q. So that when you testified for the Court on the trial in this proceeding that you didn't consummate any transaction and didn't purchase anything and you went out 10 or [fol. 5571] 15 times to the Market, and the first time you made an investment or purchase or got any interest in Nazareth was on September 4, 1951—was that true or was your testimony on pretrial on September 2nd, 1958 true?

A. Both are true for the following reason—

• • • • • • •

[fol. 5574] "Q. Do you know that Mr. Malakoff did sign any kind of receipts he was requested to?

"A. Maybe so."

• • • • • • •

[fol. 5675] Q. As one of the items entered for which you claim a balance due in 1950, do you have an item of $937.50 which you purportedly claim to have given to John Malakoff on April 5, 1950?

A. Yes.

Q. Now, that doesn't that $937.50 apply to the Jackie Gordon deal?

A. Yes.

Q. And then you received $19,000-some-odd on the Jackie Gordon deal, correct?

A. Yes.

• • • • • • •

[fol. 5676] Q. Now, when the $937.50 was put into the Jackie Gordon deal and then you received back the capital on the Jackie Gordon deal, that included the $937.50 and you received it back?

A. Yes.

• • • • • • • •

[fol. 5690] Cross examination.

By the Court:

Now in the light of your testimony on direct I am completely confused. Did it or didn't it go to the Jackie Gordon deal?

A. No. He put, your Honor, Mr. Rosen first of all now, in the last five minutes, he told me that I have made a statement that there was no Milton Kellem deal. I remember that I got a hundred dollars profit and I got the check.

Q. I am not interested in what you said on pretrial. It is quite clear to me that on pretrial you did state that there was no Kellem deal. But what concerns me is not that. It is manifest to me that a lot of statements were made at pretrial that contradict the statements that you made before me. Ultimately it will be my job to determine when, if ever, you were telling the truth.

But I am not concerned with the statements on pretrial. I am concerned with the conflict between your statements here in this courtroom before me as to this Kellem deal.

Now according to your direct testimony, you advanced eight, in other words, you advanced enough to pay the whole deal, with the understanding that when he sold the other [fol. 5691] three quarters you would get back three quarters

of your eight, and you testified that you got it back, and you produced a check to show that you got the 6000.

A. Yes.

Q. Then you say later on he sold the deal and you got your 2000 back and only $100 because he said he had to give the deal away.

A. Yes.

• • • • • • •

[fol. 5694] Cross examination.

By Mr. Rosen:

Q. Thank you. Now the June 29, 1950 $2500 item that you have marked "Margolis"?

A. That is, this went in the Jackie Gordon deal.

[fol. 5695] Q. That is right.

A. I am not claiming this money, Mr. Rosen—

Q. No, please.

The Court: Quiet. Answer the question only.

Q. So that this $2500 which you also have in the margin and which also on your records shows as unpaid, that went into the Jackie Gordon deal and you received back under the Jackie Gordon deal this capital; correct?

A. Yes.

• • • • • • •

[fol. 5698] Q. Now I show you item December 14 in your ledger—I am speaking constantly of Claimant's 7 in this trial—S. Rosenkrantz $2825, and your ledger shows that item unpaid and you have carried it over in red pencil as showing unpaid with an item $2850. Now, Mr. Katzenell, I believe you testified at this trial you received back this money, didn't you?

A. Yes.

Q. Including interest?

A. Interest, yes, profit; part of the profit or interest, you call it the way you want.

• • • • • • •

[fol. 5720] Q. Well, you paid that on Ocean Parkway and you took title to Ocean Parkway?

A. Yes.

[fol. 5721] Q. And then you handled it and sold it yourself?

A. Yes.

Q. And the $5000 was not owed by John Malakoff because you had used it as part of the purchase price on Ocean Parkway, isn't that so?

A. Yes, but I didn't want to buy this Ocean Parkway. I never went to look at it. I didn't want to buy this property. I had only been told to go and take title to it, and Mr. Malakoff, he was supposed to sell it and get my money back, and I only got $12,000 back.

• • • • • • •

[fol. 5727] Q. Here are two entries, one June 6, 1951 for $500. You have it entered under June 6, 1951, 290 East 3rd Street, $500, correct?

A. Yes.

Q. In your ledger under the year 1951?

A. Yes.

• • • • • • •

[fol. 5729] Q. Mr. Katzenell, I again ask you to look and tell me whether these two $500 items are not included in the total of $44,407.66?

A. Yes.

The Court: Yes, they are not included or yes, they are included?

The Witness: They are included.

• • • • • • •

[fol. 5731] Q. I again ask you, did you receive on the Jackie Gordon deal on April 3, 1951, $20,062?

A. Yes.

Q. So when you said No, that wasn't true?

A. No, it was true, because you formed the question, did you make in 1951 an entry.

Q. Mr. Katzenell, the question was just read to you and I didn't—

[fol. 5732] The Court: Come now. Will you stop quibbling? You have gotten him to admit that he received it on April 3, 1951. What more do you want?

Q. On your ledger—
A. Yes.
Q. —Claimant's 7—
A. Yes.
Q. —is there an entry to that effect?
A. Yes.

• • • • • • •

[fol. 5769] The Court: Sustained.

Q. Which of these stories are true? The one—
A. They are, both stories are correct.
Q. The one on the pretrial as to what transpired in May of 1951 or the testimony that you gave the Court as to what transpired and the conversation in May 1951?
[fol. 5770] A. It is true what—

The Court: I think you got a third. Which is true? His testimony on the deposition, his testimony on direct, or his testimony on cross? Because now he says he bought a quarter of a quarter of a contract as against 50 shares.

Q. Which of these three stories are true?
A. Mr. Rosen, please, I explained to you on the pretrial that I have given a check for $2500 for a venture in Nazareth. Other people have also given that money. It has been sold in the meantime. It came only later on, four or five months later, that Mr. Malakoff bought this Market, and there was a real investment which I made. That is—first I bought a contract—

The Court: I will construe your answer to mean that the third story is now the true story.
The Witness: Yes, your Honor, but all the three stories, they fit all together.
The Court: They may fit to you, Mr. Katzenell, but they don't fit to me, without a shoehorn.

• • • • • • •

[fol. 5814] The Court: Which gave rise to your getting possession of Claimant's 110, 111, 112, and 113.

A. My attorney at that time, Mr. Gotthelf, spoke to Mr. Malakoff, to have agreed that Mr. Malakoff will give me ten

notes as security for my stock which he did not have in his possession at that time, with the understanding that each note which he pays in the meantime until such date until he will get the stock will constitute a repurchase of five shares.

• • • • • • •

[fol. 5817] Q. Did you also testify as I just read that Mr. Malakoff paid three notes, that Mr. Malakoff paid three notes? When you testified here on this pre-trial. You testified that he paid three notes?

A. Yes.

• • • • • • •

[fol. 6041] Recross examination.

By the Court:

The Court: Did you receive $1750 from someone named Wachtel?

The Witness: Yes.

[fol. 6042] The Court: And was that for one-half of your one-half interest in the Blossom & Saul deal?

The Witness: I think so.

• • • • • • •

[fol. 6165] Direct examination of Jerome Fried.

By Mr. Rosen:

Q. Mr. Fried, because you haven't a lawyer I am submitting a prima facie case on your behalf in the same manner as I have done heretofore; but I am not representing you. You understand that?

A. I know.

Q. And if you have any objection or if you feel anything is improper that I ask you, even on your prima facie, you may voice your objection. I am not representing you.

• • • • • • •

[fol. 6166] Q. As you have claimed previously, you acted on behalf of your father Aaron Fried in acquiring on his

behalf three shares of the capital stock of Nazareth Fair Grounds & Farmers Market, Inc., is that right?

A. That is right.

Q. I show you photostat of a check which you furnished to my office dated December 7, 1951 and ask you whether you recognize your father's signature on that check?

A. Yes, I do.

Q. Did you receive that check from your father?

A. Did I receive it?

[fol. 6167] Q. This check originally from your father.

A. He gave it to me to give to John Malakoff.

Q. Did you then deliver it to John Malakoff?

A. Yes.

• • • • • • •

[fol. 6170] Q. I ask you to look on the reverse side of this check, which is dated December 7, 1951, and see if you can refresh your recollection from any notation that appears on that check?

A. That is why I answered the way I did. On the back side it says 1/200 share of Nazareth Fair Grounds & Farmers Market, Pennsylvania.

• • • • • • •

[fol. 6178] Q. Mr. Fried, I show you a check dated October 20, 1952 to John Malakoff, agent, for $2000 and ask you whether your father's signature appears thereon?

A. Yes, sir.

Mr. Rosen: Excuse me.

If your Honor please, may I withdraw that question and answer. We have a check here of January 1952, I would like to take it in sequence.

The Court: All right.

Mr. Rosen: Thank you, your Honor.

Q. I show you a check dated January 7, 1952 to John Malakoff for a thousand dollars which purports to have the signature of Aaron Fried—this is a photostatic check. Do you recognize the signature of Aaron Fried?

A. Yes, sir.

Q. Do you recall the circumstances, conversation time [fol. 6179] and place, who was present, when this particular check was transacted?

A. No, sir.

Q. Now the check on its face shows a date of January 7, 1952; correct?

A. Yes.

Q. I refer you and ask you if you can refresh your recollection to the notation which appears on the reverse side of the check as to what transpired.

A. It says for 2/100 shares of Nazareth Farmers Market and endorsed John Malakoff, John Malakoff, Agent.

• • • • • • •

[fol. 6185] Q. I show you a check dated October 20, 1952 to John Malakoff, Agent, for the sum of $2000 which purportedly bears Aaron Fried's signature and ask you whether you recognize that signature?

A. Yes, I do.

Q. Is that your father's signature?

A. Yes, it is.

• • • • • • •

[fol. 6186] Q. I ask you to look at the check, Mr. Fried, and the check is dated October 20, 1952, is that correct?

A. That is correct.

Q. And on the reverse side of the check I bring to your attention that there is the following notation: a thousand [fol. 6187] loan, a thousand one, 200 shares Nazareth.

Does that refresh your recollection as to what conversation took place at about the time or even if it happened prior to the issuance of this check of October 20, 1952?

A. That doesn't recall any recollection of any conversation.

Q. Was the notation a thousand loan, one thousand one, 200 shares Nazareth on this check prior to the check being deposited or for clearing in the account or clearing the account?

A. That is a little—I don't understand the question.

Q. Who put the notation a thousand loan and a thousand one, 200 shares Nazareth?

A. I did.

Q. Is that your handwriting?

A. Yes, sir.

Q. When did you place that notation on this check?

A. At the time that the check was made out to John Malakoff.

Q. In other words, would you say that notation was placed there by you on or about October 20, 1952?

[fol. 6188] A. I would say so.

• • • • • • • •

[fol. 6189] Q. I show you a check dated January 2nd, 1952 for $16.67 to the order of Aaron Fried, and then I show you checks respectively dated February 1, 1952, March 1, 1952, April 1, 1952, May 1, 1952, June 2nd, 1952, July 1, [fol. 6190] 1952, August 1, 1952, September 1, 1952, October 1, 1952, November 1, 1952, all in the sum of $33.34, checks Decembe[illegible] 1, 1952 in the sum of $50, January 2nd, 1953 in the sum o[illegible] $50, April 1, 1953 in the sum of $50, May 1, 1953 in the sum of $83.34, and ask you whether these checks were received by your father to your knowledge or by you on his behalf, and in any event whether his endorsement appears on the back of these checks.

A. His endorsement appears on all of these checks.

Q. Are all of these checks signed respectively John Malakoff, Agent or John Malakoff, Special and John Malakoff individually as appears on the specific checks, respectively?

A. It seems that all of these checks are signed by John Malakoff or John Malakoff, Special and one, agent; all three titles.

Q. Do you know what these checks represent?

A. They appear to represent his return on his investment with the Nazareth Fair Grounds.

• • • • • • • •

[fol. 6192] Q. And for giving a check of January 7, 1951 for $1000, the checks respectively of February 1, 1952, March 1, 1952, April 1, 1952, May 1, 1952, June 2nd, 1952, July 1, 1952, August 1, 1952, September 1, 1952, October 1, 1952 and November 1, 1952 in the sum of $33.34 represented a return of 20 per cent on $2000 that had been given, the total on January 7, 1952, inclusive of the one of December 7, 1951 of $33.34?

A. It seems correct again.

Q. That is a 20 per cent annual payment, monthly instalment?

A. Yes.

Q. And that for giving on October 20, 1952 an additional $1000 as claimed by you on the Nazareth investment, the [fol. 6193] checks of December 1, 1952, January 2nd, 1953, were payments of 20 per cent on an annual basis on the $3000 investment?

A. Correct.

Mr. Seligson: How much was that?

Mr. Rosen: $50.

Q. Now, I note that the checks of February and March of 1953 are missing from the debtor's file. Do you know whether there was any receipt of the payments of any $50 in February and March of 1953 that were made to your father Aaron Fried?

A. As I recall there were payments made in those months.

Q. Do you know from what source those payments were made?

A. To the best of my recollection they were drawn on an account at the Second National Bank in Nazareth.

Q. Were they corporate checks of Nazareth Fair Grounds & Farmers Market?

A. I can't be sure of that.

Mr. Rosen: Professor, have you a record of the payments previously referred to?

Mr. Seligson: February 2, 1953, $50 for Aaron Fried and [fol. 6194] March 2nd, 1953, Aaron Fried $50.

The Court: So that the record may be clear, what did you just read from?

Mr. Seligson: The report of Siegelberg & Company, accountants and auditors as of June 30, 1953 for Nazareth Fair Grounds & Farmers Market, Inc.

Mr. Rosen: My recollection may be wrong. I think that is in evidence.

Mr. Seligson: A copy of which report has been marked.

The Court: Yes. I just wanted the record to show what you were reading from.

Mr. Rosen: Yes, sir.

By Mr. Rosen:

Q. Now I show you in addition a check of April 1, 1953 for $50 and ask you whether to your knowledge that is still a return of 20 per cent annually on the $3000 which by this time Mr. Malakoff had received?

A. Yes.

Q. Now, among this particular batch of checks, Mr. Fried, we have a check here for $83.34 to Aaron Fried. Do you know what that check represents?

A. Offhand I don't know, Mr. Rosen.

[fol. 6195] Q. To your knowledge does that check represent any payment of interest on the money given to John Malakoff?

A. It could be, only because my dad only had that one kind of situation with John Malakoff.

Q. That 20 per cent return on $3000 represents only the return on $50 monthly payment, isn't that so?

A. Yes, but if I recall, I think there was a $1000 loan as well and I thought that—no, that wouldn't work out either. Unless he had more money loaned to him at the time that I can recall.

Q. Would this in any way refresh your recollection? $33.34 is equivalent to a 20 per cent return on $2000?

A. Yes.

Q. Isn't that correct?

A. Yes.

Q. Your father according to your story was only entitled to 20 per cent on $3000 claimed investment on Nazareth, isn't that correct?

A. Correct.

Q. Which would be equivalent to $50 monthly instalment payments?

[fol. 6196] A. Right.

Q. The amount of this check is $83.34 which would show an additional 20 per cent payment on $2000?

A. Yes.

Q. Received in the month of May?

A. Yes.

Q. And in April he had only received $50?

A. That is right.

Q. Now, was he receiving 20 per cent interest on loans that he made to John Malakoff?

A. No. At some time it worked that way, but there was no specific amount on any loan.

• • • • • • •

[fol. 6202] Cross examination.

By Mr. Rosen:

Q. At the time that you testified previously in the Katzenell claim you said you went up and signed as you claim blank certificates, is that so?

A. That is so.

[fol. 6203] Q. And that was when?

A. Some time in January, 1953.

• • • • • • •

[fol. 6221] BARRY CLARK, resumed.

Direct examination.

By the Court:

Q. Now am I to understand that your testimony is that you gave Mr. Malakoff, in addition to Claimant's 2 and Claimant's 3 in the Clark claim, a thousand dollars in cash?

A. Yes, sir.

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[fol. 6671] JEROME FRIED, having been previously duly sworn, resumed the stand and testified further as follows:

• • • • • • •

[fol. 6672] Direct examination (continued).

By Mr. Rosen:

Q. Mr. Fried, will you state the time, please, who was present and the conversation that led up to your purchase of two shares—is it two?

A. Of three.

Q. —of three shares of Nazareth stock?

A. Time and place is quite vague, except as it is related to other things.

Q. Will you kindly state them in sequence, if you can?

A. I will try, Mr. Rosen.

Some time in 1950 I had an interest in a Warren Street piece of property, located at 96 Warren Street.

• • • • • • •

[fol. 6675] Q. Did you pay this thousand dollars that you claim you paid by check or cash?

A. The check could have been paid to Malakoff or for Mr. Forman—I don't recall that. It was paid by check.

• • • • • • •

[fol. 6677] Q. When was it sold, to your knowledge, by you?

A. Some time in the winter of 1951.

• • • • • • •

[fol. 6678] Q. Do you know then what profit or what profit you claim was made on the sales price as between your original purchase price?

A. The total amount that I was to get at the time of resale was $2100 net. I think that was the figure. Between 2000 and 2100 dollars net. That is, after my thousand dollars came off the—

• • • • • • •

[fol. 6679] Q. What happened with your principal investment of the thousand dollars?

A. That I took. I got that back.

Q. So you got paid back a thousand dollars from Mr. Malakoff himself, I imagine, rather than taking it out of the check which you gave to Mr. Malakoff?

A. It didn't come out of the check I gave Mr. Malakoff.

Q. What I am saying is, Mr. Malakoff gave you his check for a thousand dollars.

A. Yes.

Q. So you got back your principal. And then the profit you claim of $2100 you left with Mr. Malakoff for him to use until such time as you picked out some investment that his office had?

A. I didn't say to use it. I didn't—

[fol. 6680] Q. What was Mr. Malakoff to do with the $2100? Was he to open a trust account?

A. He held on to it, that is all I know as far as—

Q. In other words, you gave it to him?

A. Yes, I gave it to him to hold until I found something that I wanted.

Q. You knew Mr. Malakoff, when you gave him money in that manner, utilized it as he saw fit?

A. I know now, Mr. Rosen; I didn't know then.

Q. Well, you didn't tell him to open up a trustee's account or anything, did you?

A. No.

Q. How long after the transaction involving your giving Mr. Malakoff this $2100 under the conditions that you claim did you have any further conversations relative to this $2100 with Mr. Malakoff?

A. Not until I decided I wanted a piece of Nazareth Fair Grounds.

Q. How long after was that? How many months?

A. Oh, not very long, Mr. Rosen.

Q. About how long?

[fol. 6681] A. A few months.

Q. Where was that conversation, and who was present? I might show you a purported, what has been purportedly called in this court a dividend check and ask you to look at your first dividend check, if that can refresh your recollection as to when you had the conversation with Mr. Malakoff, if at all, regarding any acquisition of Nazareth stock.

A. Well, based on this, I can only say that I had the conversation with him some time in August or September, '51.

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[fol. 6682] Q. Well, did Mr. Malakoff tell you that he had some type of interest or investment or acquisition in Nazareth, Pennsylvania, some property?

A. The things that sort of stick to one's mind, the things, like he would say to me, "I got something in Nazareth that is going to be a baby of mine, and this is something I am going to retire on"—and these things I can remember. But the general conversation is hard to remember. I would

imagine the only reason I remember things like that is because I was pretty much interested, being with Mr. Malakoff for only a short time and seeing the way he operated at that time. He spoke like words of wisdom, pearls of [fol. 6683] wisdom I remember about real estate.

Q. When you saw how he operated, Mr. Fried, in these general operations, from your observation and what you heard, was his method of operating one where he got various people to give him money for the purpose of their investing in real estate that he found?

A. It certainly seemed that way to me.

Q. From your observation and your knowledge, Mr. Malakoff was not a man of means, he had no real money?

A. Well, at that time I thought he had a great deal of money.

Q. What conversation did you have with him, either in the car or in his office, and who was present when the conversation took place regarding your acquisition of any interest in Nazareth?

A. I don't know that anyone was present, Mr. Rosen.

Q. What was the conversation, and try to be as specific as you can?

A. I merely told Mr. Malakoff to apply my 2100 or 2000 dollars towards the stock in Nazareth, towards the interest [fol. 6684] in Nazareth.

I am confusing things a little bit because I don't believe I knew there was a question of stock at that time; I am not sure.

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[fol. 6702] Q. When did you receive this stock certificate, Exhibit 3, and under what circumstances, by mail, in person, and from whom?

A. If I recall, I believe I picked it up at John Malakoff's office some time in the winter, when I got into New York occasionally after—while I was at Nazareth.

Q. Was that in 1953?

A. Yes.

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[fol. 7074] Cross examination of
Arnold A. Weinstein.

By Mr. Seligson:

Q. Was the company able to pay its bills as they became due on July 30?

A. I remember, Professor Seligson, that after I became the president of this corporation and was going down from [fol. 7075] Nazareth regularly, I recall that there were on the books obligations of many thousands of dollars that had been past due, and I recall instituting a program which would be designed to reduce those obligations.

I might say that we never succeeded in reducing them completely.

Q. But on July 30 did Nazareth have the money necessary to pay its bills as they matured?

A. No.

Q. Did it have the money necessary to pay those bills when they matured on July 13 when Mr. Rosen was retained?

A. I don't know. I don't remember, really.

Q. Well, was there a change in the condition of the company between July 13 and July 30?

A. The only change that I can tell you of is the fact that I decided that we ought to try to go ahead and pay bills.

Q. Mr. Weinstein, you are not answering my question.

A. I don't quite follow you.

Q. Did Nazareth have the money on July 13 to pay all of its bills which were then due and payable?

[fol. 7076] A. No.

Q. And that is the day that you consulted with Mr. Rosen, is it not?

A. Yes.

Q. And that is the day he was retained to represent Nazareth in connection with the two judgments that had been entered and in connection with the stock dispute?

A. That is right.

Q. Now, what was the conversation or the discussion at the meeting on July 30 about the filing of a Chapter XI petition?

A. There was, as I recall it, this statement which appeared in the minutes drawn by Mr. Rosen that this was designed to protect the corporation in the event that somebody tried to jump the gun, because he didn't know what obligations were outstanding, and, as a matter of fact, none of us knew what outstanding obligations there were in this corporation.

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[fol. 7644] Cross examination of
Jerome Fried (resumed).

By Mr. Margolis:

Q. Mr. Fried, from the gross receipts debtor gets 15 per cent, isn't that right?

A. Not all the time.

Q. It gets less sometimes?

A. Yes, they do.

Q. It goes down as low as 12?

A. And sometimes less.

Q. And the rest goes to the operator of the races, meaning Nazareth Enterprises?

A. The rest—no.

Q. I mean the gross, the rest of the gross?

A. You are taking part of the gross out for the Market. A great portion of the gross goes to the boys that run the races as a purse.

Q. Yes. That is an operating expense.

A. Yes, because—

Q. In other words, the debtor gets 15 per cent of the [fol. 7645] gross?

A. They can't lose; that is right.

Q. Mr. Fried, will you please answer the question? We are trying to determine the debtor's take.

Mr. Margolis: Will you read the question?

(Question read.)

Q. Now isn't it a fact that debtor gets 15 per cent of the gross receipts?

A. Not always.

Q. Or 12 per cent?
A. Not always.
Q. They get less than 12?
A. Sometimes 10.
Q. And the rest of the gross naturally goes to the operator, which is Nazareth Enterprises, isn't that right?
A. Yes.

Cross examination.

By the Court:

Q. What determines the percentage that the—
A. Well, I have to explain that to your Honor. May I?
Q. Yes, I am asking you.
A. At the beginning, when—I had never seen a stock car [fol. 7646] race in my life until I came to Nazareth. I have to bring this out. I will try to be brief.
Q. You don't have to give me this whole story. I asked you a simple question.
What determines the percentage? Is it in the contract?
A. No. It depended—when I spoke to Mr. Weinstein about that it depended on the type of show we were putting on, inasmuch as certain types of shows, because of the higher cost, we would—the Market would still get more dollars and cents if I could possibly run this kind of show, even at a 10 per cent the debtor would get more rent in dollars and cents than if I couldn't run the show because of the 15 per cent rental. I couldn't possibly run that type of show. It wasn't just a single type of automobile race. And when I ran certain types of events the percentage became less because I just couldn't pay the other figure.

Cross examination.

By Mr. Margolis:

Q. Is it your testimony—

The Court: Just a minute. Let me see Margolis Exhibit C again.

(Mr. Margolis hands exhibit to the Court.)

[fol. 7647] Cross examination.

By the Court:

Q. Mr. Fried, will you please read the third paragraph of Margolis Exhibit 1 (handing to witness)?

A. Yes; I did.

Q. That paragraph provides that the debtor is to get 12 per cent of the gross receipts of the lessee except where the lessee sells food, in which case the debtor is supposed to get 15 per cent?

A. That is right. That is what the lease has been.

Q. Has that been adhered to?

A. It hasn't been always adhered to, no, sir.

Q. Has the debtor ever gotten any more than the lease provides?

A. In percentages, do you mean? No.

Q. Has the debtor ever gotten any less than the lease provides?

A. Yes, sir.

The Court: Are you listening, Mr. Rosen?

Mr. Rosen: Yes, your Honor. I hear everything.

Q. Was there ever a modification in writing of the terms of that lease?

A. No, sir. I might have sent the letter—

[fol. 7648] Q. I don't care what you might have done.

A. No, I don't recall anything in writing, your Honor.

Q. All right. Was there ever an oral, an attempted oral modification of the terms of that lease?

A. There was an oral modification of the lease.

Q. When did that take place?

A. Oh, some time in—after the new election, after the election of officers at the meeting in June, '53.

Q. Where did it take place?

A. Mainly at the Fair Grounds. It was discussed on several occasions.

Q. Who discussed it?

A. Mr. Weinstein and myself.

Q. What, in substance, was said by each of you?

A. Well, I had told Mr. Weinstein that, as the races were

going, it was absolutely useless for me to continue to run them because there was nothing in it, and I just didn't feel like—I already had a loss on it—I told him that there was a possibility, inasmuch as people were looking for more [fol. 7649] than just an ordinary stock car show, that if I could boost the purses and boost the type of show generally by giving double shows, two different types of shows the same day, I told Mr. Weinstein that I believed that we could draw enough people to make it worth while both for the Market and for myself, because if it didn't pay for me to continue to run them I just wasn't going to do them.

Well, I told Mr. Weinstein at that point that some of those double shows, the guarantee that I would have to pay for the shows ran around $2500, the guarantee payment for the exhibition, and that on the basis of how it was running it was absolutely impossible to do.

And Mr. Weinstein thought it was a good idea to give it a try to see whether or not the Market would get more dollars and cents out of the situation than we were getting before—when I say "we" I mean the debtor, your Honor—than the debtor was getting prior to my installation of this new type of show. And, as it turned out, it worked that way very well. My gross receipts went up quite heavily after that, and the rent became very good. Where I was only charging a dollar and a quarter admission we [fol. 7650] were able to get a dollar seventy-five to help defray the cost.

And then Mr. Weinstein agreed that on these particular days where a double show, as I call them, twin bills, you know, were held, then I would pay the 10 per cent. And the 10 per cent, your Honor, always was more than any 15 per cent that I was ever able to pay before that.

The Court: All right. Go ahead.

Cross examination.

By Mr. Margolis:

Q. Mr. Fried, did you ever take that up with directors, outside of discussing it with Mr. Weinstein alone?

A. I didn't.

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[fol. 8333] Cross examination.

By Mr. Seligson:

Q. Now, during the month of May 1953 while the races were being run who operated the food concessions?

A. I think at that time it was just Jim La Grotte, I [fol. 8334] don't think it was—I don't think he had the J & J yet.

Q. And did La Grotte pay to the debtor 15 per cent of the gross amounts received by him in connection with the food concession during the races?

A. I don't believe he did.

Q. And how much did the Nazareth Enterprises pay?

A. Well, as I recall, I think I was paying at that time, I think it was 12 or 15 per cent, I don't remember which.

Q. Well, according to the lease the amount to be paid was 12 per cent of the gross commissions except where the lessee operated the good concessions, in which case the lessee was to pay the lessor 15 per cent?

A. Yes.

Q. Now, then, in the month of May did you pay 12 per cent?

A. I remember certain times—I don't remember if this is one of those times, Professor, during that period where although—

Q. This is a few months you see before the filing of the reorganization petition.

[fol. 8335] A. Well, that is immaterial, and that does not matter to me as to what my thinking about that is, but at the time I had a conversation with La Grotte about how the rental would be paid, and inasmuch as I took the races originally with Sherman and this other party solely for the purpose of what kind of rental we could get for the market, but then when we opened the 1953 season these people refused to put any money into the races, these other people and—

Q. What other people?

A. Sherman and the other man, and there was a great deal of work that had to be done in that year, and so I felt that the picture would change. This was to be—sup-

posed to be done like in January, February or March before the races, but it never got done, you see, because they never came up with any money.

So I assumed the responsibility and set up the corporation and so on, and that was the end of the third party and Joe Sherman.

Q. In other words, you took over the races at the end of April 1953 when Nazareth Enterprises, Inc. was organized? [fol. 8336] A. No. I think I tried to open the races before the end of April regardless of whether the gross was set up or not. I think we got run out at the first four meets, if I recall correctly, and then—

Q. Just a moment. Did you pay Joseph Sherman anything for the assignment of the lease?

A. No, sir. He had nothing coming to him.

Q. Then you became the sole owner of Nazareth Enterprises, Inc.?

A. Yes, and at that point, and my recollection is helped by this particular Examiner's Exhibit AP, because I remember getting—checking the balance regardless of what the bank statement said, because there are always checks in transit and I always had checks that were written, and I am talking about debtor's checks.

Q. What happened that you remember?

A. I remember telling Jim La Grotte that although I would continue to have the races run, and I think it was 15 per cent, but I believe I told him to continue to pay his rent for his concessions on Sunday along with his Wednesday and Saturday business. In other words, I was not tak- [fol. 8337] ing the food concession as I should have done, but instead of that I was paying higher rentals for the races, and I told Jim not to pay me or the Nazareth Enterprises for the food concession at that time.

Q. Did you have any conversation with John Malakoff concerning the organization of Nazareth Enterprises, Inc.?

A. I don't remember if I did or not, Professor.

Q. Did you have any conversation with him concerning the assignment of the lease, the original of Margolis Exhibit C, from J. Sherman to Nazareth Enterprises, Inc.?

A. You mean the assignment of the lease?

Q. Yes.

A. I don't remember that.

Q. So that starting with March, 1953, you took over the races and you ran them for the balance of the year, is that right?

A. Yes, and the years after that, too.

Q. And since that time?

A. Yes.

Q. And you have run them since?

[fol. 8338] A. Yes.

Q. Now, you continued also as manager of the market, is that correct?

A. Yes.

Q. Did you draw a salary from Nazareth Enterprises, Inc.?

A. No, sir.

Q. What did you do with the income from the races?

A. Spent it on losses.

Q. You mean that you lost money in 1953 on the races?

A. I sure did.

Q. And does your accountant have a record of those losses?

A. Yes, he has.

Q. And did you continue to pay 15 per cent of the gross admissions to the debtor?

A. I don't remember how long I continued that. I mean the pressure got a little too much on me at that time.

Q. Did there come a time when you took over the food concessions at the races?

A. I never took them over per se.

[fol. 8339] Q. Well, did there come a time?

A. There came a time, yes, when I changed the method.

Q. Well, in what way did you change the method?

A. Well, I believe it was after—after I helped get the J & J Foods set up with regard to getting Jim a partner as my brother, and at that time I was given an offer by an outside food concessionaire from Philadelphia, and I don't recall the man's name any more, but he offered a price, a fixed price to let him in to run the food concessions on Sunday. He was not interested in the market concessions at all.

Well, it was a pretty good offer and I was very tempted to

take it because I needed money again in 1954, and getting an offer like this—

Q. What did you do? What did you do?

A. Well, If you don't mind, Professor, I would like to continue what I am telling you.

Q. Just tell us what you did, please, and not your reasons for it.

A. I finally worked out—all right, I finally worked the situation out.

Q. What did you do, please?

A. Well, I couldn't do anything, I have to say, then, [fol. 8340] except to say that I worked out my situation with the J & J Foods at that time.

Q. And when was this?

A. In 1954.

Q. And in what way did you work it out? What change was made?

A. The change that was made was that the rental of 15 per cent, you know I mean in going to the Nazareth Enterprises, Inc. instead of to the market, instead of to the debtor, and I would then pay the—well, I wasn't paying anything, but then I would pay the 15 per cent rent on the gross admission less the taxes to the market.

Q. Just a moment. The change was that you would pay to the market 15 per cent of the gross admissions?

A. After taxes.

Q. After taxes?

A. Yes.

Q. And that you would get the 15 per cent from La Grotte—

A. Right.

Q. And you say this started in—

A. Instead of my taking over the food concessions.

[fol. 8341] Q. You say this started in 1954?

A. Wait a minute. You asked me when did I take over the food concessions and not run the food concessions.

Q. You see, Mr. Fried, you are volunteering information that I have not asked you anything about.

A. Well, the point is I never took over the food concessions, to answer your question properly.

The Court: Well, then answer it properly and say never.

The Witness: Yes, I am sorry. I never took over the food concessions, but I thought that you would like to know—

Q. But you did finally—

A. —something else.

Q. But you did finally in 1954 make a new arrangement under which you agreed to pay the debtor 15 per cent of the gross admissions?

A. Yes.

Q. And you got 15 per cent from La Grotte on the food that was sold at the races?

A. Yes.

Q. And did you consult with anybody representing the debtor in regard to this change that was made?

[fol. 8342] A. I don't remember if I did or not.

Q. Prior to the time the change was made were you paying 15 per cent to the market, or to the debtor?

A. I believe it was on account—

Q. And in addition to that the debtor was getting 15 per cent from La Grotte?

A. Well, I think the records would show all that, Professor.

Q. Now, Mr. Fried—

The Court: This last arrangement in 1954 was after the petition had been filed in the Chapter X proceeding, wasn't it?

The Witness: Yes.

Q. And was that the arrangement under which you have continued operating down to the present time?

A. Not completely, no.

Q. In what way has it been changed?

A. It has been changed, and I don't remember when the change came about, but I had offered when these proceedings started in particular, and I was told by Mr. Rosen that my lease was rejected or was being rejected, and then—

Q. Please, Mr. Fried. All I want to know is was there [fol. 8343] a change, that is all?

A. Yes, there was a change.

Q. And when was the change?

A. I don't remember.

Q. So far you said that the other change took place in 1954?

A. Yes.

Q. Well, did this change take place within a few months after that?

A. I don't remember if the change took place in—

Q. Or a year or two?

A. I don't remember if the change took place in '53 or in '54 regarding the rental that I was to pay the market.

Q. Now, just a minute, Mr. Fried.

A. Yes, sir.

Q. Are you going back to the first change, the change that you made under which you paid 15 per cent of the gross admissions and you got 15 per cent from La Grotte? Are you saying that might have taken place in 1953 now?

A. No, you are asking me about the change in your questions, and if I may say so—

[fol. 8344] Q. Which change came first, Mr. Fried? Just answer that.

A. There was a change in the rental—

Q. Yes?

A. —regardless of the La Grotte percentage.

Q. Well, will you please answer which change came first?

A. I don't recall that, Professor.

Q. What was that change, then?

A. The change was that I had spoken to Mr. Weinstein—

Q. Please just tell us what the change was.

A. I paid a lesser rental on certain types of shows.

Q. What was it?

A. 10 per cent.

Q. On what?

A. On the gross admissions, less taxes.

Q. On all shows?

A. On certain types of shows.

Q. All right. What types of shows?

A. For example, if I would have a show that ran particularly the ordinary stock car shows, then that would be a reduction in the rent.

[fol. 8345] Q. And how ong did the ordinary stock car show run?

A. I don't understand the question.

Q. You just said that you had a show that ran on the time that the ordinary stock car show ran.

A. I didn't say anything about time. I said I would then discuss it.

Q. What would you discuss?

A. In other words, Professor, there are shows which were known as double shows, and it is an outdoor type of show where they use ramps and things like that and run over other cars, crash into them.

Q. Yes?

A. And that is another type of show.

Q. And on that type of show what did you pay?

A. 10 per cent. In other words, I would have two shows on the one day, whereas for general admission that was only about 50 per cent more than just the ordinary stock car show.

Now, I have to explain it so that you know what I am talking about.

Q. And so on some admissions you would pay 15 per cent and on others only 10 per cent?

A. Not on the same day. In other words, if I was running [fol. 8346] what we were advertising as the double show, then I would be paying 10 per cent.

Q. On what, on the admissions?

A. On the admissions for that day.

Q. For that double show?

A. Right, and that is when it was 10 per cent.

Q. And when was it 15 per cent?

A. When I would run just the ordinary stock car show.

Q. Now, with whom did you make the arrangements about this change?

A. Mr. Weinstein.

Q. But you don't remember when this change was made?

A. No, I don't.

Q. And this was a change that was made without regard to the arrangements had with La Grotte?

A. It had nothing to do with La Grotte.

Q. And had you continued—

A. It is just, Professor, that I wanted to give the races up; I didn't want to run them.

Q. Mr. Fried, there again I have not asked you for any reasons as to why this was done. I just asked you what the change was.

[fol. 8347] A. And I just told you.

Q. You told him—

A. Your Honor, may I say something, please?

The Court: No, just answer the question.

Q. Have you continued under both of these arrangements down to the present time?

A. Yes, I have.

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[fol. 8681] Direct examination of James La Grotte.

By the Court:

Q. Mr. Lagrotte, during the year 1952, when you had the food concession at the Market, where did you sell your food? I mean, did you have one location or a number of locations, and what were they like?

A. When I sold the food, your Honor?

Q. Yes.

A. We had three locations, your Honor, at that time, in '52.

Q. What did you sell?

A. Hot dogs, hamburgers, soda, and steak sandwiches. [fol. 8682] That was the only thing we were selling at that time.

Q. Were the races running at that time?

A. In '52? In June, 1952 I believe they were, your Honor, yes.

Q. Now who supplied the food that was sold to the people who came to the races?

A. At the end of the race season in 1952, I did, your Honor.

Q. Who supplied it before that?

A. H & M also.

Q. You say you took over H & M's lease, or did you get a new lease?

A. We got a new lease, your Honor, I got a new lease.

Q. You don't have a copy of that any more?

A. No. That burned, your Honor.

Q. You used to pay the Market 15 per cent of your gross receipts for rental, is that right?

A. That is right.

Q. Now did that arrangement include the food that you sold at the races?

A. At the races—no, your Honor. The races was paid to the promoter.

Q. How much?

[fol. 8683] A. 15 per cent.

Q. Who was the promoter then?

A. When I started it was Pat Zambrelli. I think that is the name. Oh, no. He was with the club. But the promoter, I don't know just what his name was.

Q. Was it Gordon?

A. That sounds familiar, your Honor.

Q. Whom did you actually make your payments to after the races of the 15 per cent for the food that you sold? Whom did you give the money to?

A. I believe, your Honor, that was Gordon. But we only had two races, two Sundays, that's all I had with him, the last two races that he was there.

Q. Now when did the races start in 1953?

A. In 1953, in April some time.

Q. Between April and September, 1953 did you supply food at the races?

A. That's right. I supplied food after that, all the way through.

Q. That was after you had your new lease, is that right?

A. Not yet. No, I didn't have no new lease yet.

Q. It was still the same lease under which you had gone in originally?

[fol. 8684] A. That is right.

Q. To whom did you pay the 15 per cent in 1953?

A. In 1953, to the Nazareth Farmers Market.

Q. You paid directly to the Market?

A. That is right.

Q. On what you sold at the races?

A. At the races.

Q. Was there a Fair in 1953?

A. Yes, I believe there was.

Q. Did you sell food at the Fair?

A. I had one stand, your Honor, that's all, at the Fair. The rest of them were closed.

Q. On that one stand, to whom did you pay?

A. Julius Fried, the rent. That is for one week.

Q. You paid that to Jerome Fried's brother?

A. Yes, your Honor.

Q. Now in 1954 were there races?

A. Yes, your Honor.

Q. Did you continue to supply the food, sell the food, during the races in 1954?

A. Yes, your Honor.

Q. To whom did you make payment of the percentage?

A. In 1954, in 1954, your Honor, I believe I started paying Jerry Fried then, Jerome Fried.

[fol. 8685] Q. It was in the beginning of 1954 that you went into the formation of J. & J. Foods with his brother, is that right?

A. That is right.

Q. Now J. & J. Foods sold food from stands and ran a bakery shop in the Market, is that right?

A. That is right.

Q. As to those receipts, to whom did you pay the 15 per cent?

A. To the Fair Grounds.

Q. When the races started, to whom did you pay the 15 per cent?

A. At the beginning of the season I paid Jerry Fried. No. At the end of the season. At the beginning of the season, 1954 I still paid the Fair Grounds.

Q. Do you know when you changed over from paying the Fair Grounds to paying Jerry Fried?

A. Not exactly the right date, your Honor.

Q. The races didn't start until April, did they?

A. In April some time.

Q. When did they end?

A. Some time in September, some time we run all the way up to October.

Q. I am speaking of 1954. Do you remember?

[fol. 8686] A. No, that I couldn't remember.

Q. Do you remember when Julius Fried got out of the J. & J.?

A. At the end of 1954, your Honor.

Q. Now, by the end you mean December or thereabouts?

A. In January, some time, '55.

Q. Of 1955. Now was it in July or June? Can't you remember when you changed the method of paying the 15 per cent on the races?

A. 1955 there was—

Q. No. 1954, I am still back on 1954. I understood you to testify that some time in 1954 you stopped paying the Farmers Market and you started to pay Nazareth Enterprises, is that right? Jerry Fried.

A. It might be a mistake on that. I started to pay Jerry Fried when his brother left me, the following year.

Q. January, 1955?

A. 1955.

Q. Before that you always paid the Market directly?

A. The Market, that is right.

[fol. 8687] Q. Was there a fair or a rodeo during 1954?

A. In 1954 it was a fair.

Q. Did you serve food at the fair?

A. That year, yes. Just the restaurant was open that year.

Q. To whom did you pay that 15 per cent?

A. Well, that 15 per cent went with my partner. I paid 15 per cent to Julius Fried and he paid me $100 to work the restaurant that week.

The Court: All right.

Direct examination.

By Mr. Rosen:

Q. You spoke of a change in 1954 or 1955. Will you tell us what brought about the change of not paying the

Market the 15 per cent and paying 15 per cent to Nazareth Enterprises?

A. In 1955—

Q. What brought the change about?

A. What brought the change?

Q. That is right.

A. Well, the first, I mean, I done that the way Jerry Fried told me to do it, because the races don't have nothing to do in my lease. In other words, when Jerry Fried told me to pay the Market the rent I paid the Market. When he said to pay him, I paid him. Now what arrangement [fol. 8688] he made on that, that I couldn't tell you.

Q. Well, did your lease call for—you say you had a lease in 1955.

A. Yes, for the Market.

Q. Nazareth Fair Grounds & Farmers Market, Inc.?

A. Yes.

Q. Have you that lease? If I recall, wasn't that lease submitted to the Court for approval? Was that the lease?

A. No. The new lease was submitted to the Court.

Q. Have you got the old lease?

A. No; that burned up.

Q. Under the terms of the old lease weren't you supposed to pay Nazareth Fair Grounds & Farmers Market, Inc. the gross commissions of 15 per cent on all foodstuff and beverages sold, whether it was on race day or whether it was on market day?

A. No. That didn't specify. The only lease I had was the lease from Nazareth Farmers Market for market nights. The way I understood, the races was run different altogether. I mean, Jerome Fried run the races. That don't have nothing to do with the Market. When he told me to [fol. 8689] pay the Market, I paid the Market.

* * * * * * *

[fol. 8726] Cross examination.

By Mr. Seligson:

Q. But, in any event, you didn't pay 15 per cent of your [fol. 8727] gross receipts at the races to the Market?

A. No.

Q. You paid it to Gary Gordon?

A. That is right.

Q. Or somebody else?

A. Yes.

Q. And who told you to pay this 15 per cent to Gary Gordon?

A. What do you mean, who told me?

Q. Did somebody tell you to pay it to him?

A. No. Gary Gordon himself hire me for a concessionaire; he had the racetrack at that time.

Q. He had the racetrack?

A. Why, sure, if it's his name.

Q. In 1952?

A. Somewhere there. I am not sure. But it was the beginning of 1952, probably, or at the end. I am not sure exactly of the date of it, but that is when I started as a concessionaire at the racetrack, though, two weeks.

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[fol. 9010] Direct examination of
Richard S. Hull.

By Mr. Rosen:

Q. In other words, so that the next set of minutes that were entered, prepared and signed in the minute book was this meeting of June 4, 1953, correct?

A. That is right.

Q. And you had already resigned at that meeting as a director?

A. That is right.

Q. Mr. Hull, didn't you sign as a director?

A. I signed minutes subsequently, but I want—

Q. That is all I asked you.

A. Did I actually put my signature to minutes of meetings that occurred previously—

Q. I didn't ask you that.

A. What is the question?

Q. I asked you did you thereafter subsequent to your resignation as a director sign minutes that were drawn

thereafter and inserted in the minute book of the corporation?

A. Yes.

Q. That is all I asked you.

A. Applicable to a prior time.

* * * * * * * *

[fol. 9017] Q. I am sorry, Mr. Hull, let me try to review this, the sequence, June 4 was the meeting that you recall with Margolis?

A. Yes.

Q. About eight or ten days later was the meeting with Katzenell and his attorney and Kanter and so forth, is that right?

A. Right.

Q. So that we have reached about June 12 or 14th?

A. Right.

Q. And then you say there was approximately ten days to two weeks?

A. I would think so.

Q. So that we run into June 24th or the end of June?

A. Yes.

Q. So that we are now speaking of the meeting near the end of June of 1953. Where did that meeting take place?

A. If I recall, all but the big meeting took place at [fol. 9018] Malakoff's office.

Q. Who was present at this meeting?

A. The same people.

Q. In between this meeting of June 14th or approximately that date, which we have referred to as the second meeting?

A. Yes.

Q. The second meeting with Jerry Fried and yourself and Mr. Malakoff?

A. Yes.

Q. When were there any other minutes drawn in between the second and third meeting, which you have placed as between June 14th and 15th, and the end of the month?

A. Well, if you show me the minute book I will tell you that.

Q. (Hands book to witness.)

A. The minutes of July 2nd, 1952.

Q. When you say July 2nd, 1952, Mr. Hull, you mean where the dates are July 2nd, 1952, as well as July 2nd, 1953, isn't that so?

A. Yes. It seems to me there was another—it seems to me there was another meeting here.

Q. May I help you, Mr. Hull? You refer to the minutes [fol. 9019] of the meeting which are dated in this book October 22, 1952?

A. Yes.

Q. So you are now telling this Court that in between June 14th and 15th, 1953 and the end of June of 1953 and after you had resigned as a director on June 4, 1953 you drew the minutes of October 22, 1952 and the minutes dated July 2nd and 3rd, 1953?

A. 1952.

Q. The 2nd—1953 or 1952?

A. Yes.

Q. And had them signed by Jerome Fried as secretary and had yourself included as a party being present as a director?

A. That is right. A party being present as director at a time when I was director.

• • • • • • •

[fol. 9020] Q. Mr. Hull, isn't it the fact that it was after an investigation started and after you received Claimant Saul Debtor's O that you had inserted and put into Examiner's I the minutes dated July 2, 1952 or July 2, 1953, respectively, and the minutes dated October 22, 1952?

The Witness: Could you read that back to me, please?

(Question read.)

A. Yes.

Q. So that it was after you had received a letter which stated that the proceeds for the sale of the stock had not been put into the treasury?

A. After I received some letter, I don't know whether it was that letter, after I received letters from Margolis. I received a batch of them, I remember.

• • • • • • •

[fol. 9021] Q. Did you receive this letter, Debtor's O, which is dated May 25, 1953, before you drew the minutes that I asked you about and inserted them in the book?

A. I don't remember whether I received this letter. I received several letters, but I don't remember whether this was one.

Q. You notice the letter is dated May 25?

A. Yes, it is dated May 25. It is addressed to me, on the letterhead of Benjamin Margolis. I probably did receive it. I probably did receive it.

[fol. 9022] Q. Prior to your insertion of the minutes of July 2nd, 1952 or 1953 and prior to your insertion of--

A. Right, yes.

Q. —the minutes of October 22, 1952?

A. Yes.

Q. So that the time that you inserted those minutes and signed them you had been informed in writing that there were claims that the stock—

The Court: Mr. Rosen, the witness has testified that he inserted the minutes after he got the exhibit. I can divine no sane reason for you to repeat over and over and over again, by reading from the exhibit, what the man has already testified to. Please.

• • • • • • •

[fol. 9024] Q. Thank you. So that at the time that you drew the minutes when you were not a director, transferring stock of the corporation at $75 a share to Malakoff, you knew that there were stockholders that had paid a thousand dollars a share and were holding stock of this corporation at a thousand dollars a share?

A. Yes.

Q. Mr. Hull, while you were a director of Nazareth Fair Grounds & Farmers Market, Inc. and while you were the attorney for Mr. Malakoff personally, did you know that the only shares of stock issued to John Malakoff, according to the books and records of the corporation, were 20 shares of stock, which he had acquired purportedly from Zoloth & Sobel?

Mr. Robbins: Objection, your Honor.

The Court: Overruled.

A. I was under the impression that he owned all the shares of stock.

* * * * * * *

[fol. 9041] Cross examination.

By Mr. Weinstein:

Q. Getting back to Debtor's O in the Saul claim, you received that letter on or about May 25, 1953, didn't you, Mr. Hull?

A. I don't remember.

Q. All right. Do you recall in your testimony given before the Honorable John E. Joyce in the stock claims of Ida Mae Margolis and Sarah Kason, Volume 2, page 762, being asked these questions and having given these answers:

"Q. I show you a letter dated May 25, 1953, and ask you whether you received this letter from Mr. Margolis? May I say to you, Mr. Hull, it was taken from your file, or an original was taken that you gave me.

[fol. 9042] "A. It is probably so.

"Q. Read it, read it; don't tell me it is probably so.

"A. I said to you that I don't remember whether I received this in writing, but I do remember that I was notified of those things. Whether it was in writing—

"You asked me about something that happened four years ago.

"Q. You turned over a file to me with an exact copy of this letter.

"A. Does this come from that file? If it did, then I received it.

"The Referee: Pardon me, the witness will be given an opportunity to read the letter to enable him to answer it.

"A. If this came from that file, then I received it, because I gave you the whole file.

"The Referee: Is your recollection refreshed as to whether you received that letter?

"The Witness: Yes, it is addressed to me, and it has got my address on it. Yes, sir.

"Mr. Rosen: I offer it in evidence, your Honor.

[fol. 9043] "Mr. Margolis: No objection. We consent."

Do you recall having been asked those questions and having given those answers?

A. Vaguely, generally. I don't remember—if you ask me about these questions and answers without reading it to me, I wouldn't have remembered it.

Q. Do you remember it, now that I read it to you?

A. Generally, yes; not specifically.

Q. So isn't it a fact that you did receive this letter on or about May 25, 1953?

A. I still stand by what I said before, I don't remember. Whatever that says is a better recollection that I have now. That was three years ago and, in turn, was four years after the event.

Q. Now, then, Mr. Hull, I show you Debtor's P in the Saul claim for the purpose of aiding you in answering this question. Isn't it a fact that just a few days prior to the receipt of that letter you had prepared the minutes with respect to the issuance of some 180 shares of stock to John Malakoff on the date of July 2nd or July 3rd, 1953?

A. It would seem so, but I can't remember.

The Court: Would you read Mr. Weinstein's question [fol. 9044] back, please?

(Question read.)

The Court: Is that what you meant to say?

Mr. Weinstein: No, I did not.

The Court: Will you correct it?

Mr. Weinstein: I meant to say July 2, 1952 or July 1953.

The Court: That is different.

• • • • • • •

[fol. 9052] Q. All right. At the time that you drew the minutes with respect to the issuance of 180 shares of stock to John Malakoff you knew of your own knowledge that the stock or the interest in this venture was being sold for an amount varying from $600 per interest or participation all the way up to a thousand dollars, didn't you?

A. Yes.

Q. And you knew, as early as August or September, when you made your own purchase, that the interest was going on sale for $600 a share at least; isn't that so?

A. 600 plus. It doesn't make any difference. I knew that there were varying prices or I had that impression.

Q. Now with this knowledge that you had, you as a director of this debtor drew minutes authorizing the issu-
[fol. 9053] ance of 180 shares of the stock of this debtor to John Malakoff for $75 a share, is that right?

A. I have already answered that at least twice. Yes.

Q. Now you also knew at the time that you drew those minutes that there was an over-subscription of stock, didn't you?

A. At the time I drew the minutes, yes.

Q. Now according to my notes, and correct me if I am wrong, Mr. Hull, you knew in late April or early May from a conversation that you had with John Malakoff that the stock was over-subscribed, didn't you?

A. Yes.

* * * * * * *

Q. I did not ask you that. I asked you whether, after [fol. 9054] you acquired that knowledge, you advised or told or disclosed to any of the stockholders the factum of this over-subscription?

A. No.

* * * * * * *

[fol. 9353] Afternoon Session—2.15

JOSEPH SHERMAN, resumed.

The Court: I want to ask this witness a few questions.

Cross examination.

By the Court:

Q. Mr. Sherman, your claim on the thousand-dollar note is predicated upon alleged profits that were made when you and your co-adventurers were operating the races; is that correct?

A. Yes, sir.

Q. And that money, instead of being turned over to you, was used for the corporation and that is how you came to get the note.

A. Yes, sir.

Q. Now when did you and your co-adventurers, and by that I mean Mr. Fehr and Mr. Fried, when did you undertake to operate the races?

A. I believe around the 17th, between the 17th and the 21st of August.

Q. Of 1952?

A. 1952.

Q. Yes. Now what was the arrangement; how long were you going to operate them?

[fol. 9354] A. We were going to operate until November, until the weather, as long as the weather permitted, and then start again in the spring of the year.

Q. Well, there was a lease entered into at that time between the Fair Grounds and yourself, wasn't there?

A. Yes, sir.

Q. How long was that—you say that lease was to operate just until the fall?

A. No. That lease was to operate for the ensuing year.

Q. Ensuing year?

A. Yes.

Q. In other words, up through the racing season of 1953?

A. That is correct.

Q. I see. Now I show you Margolis Exhibit C in the J. Fried claim. Is this the lease that you entered into where you undertook to operate the races?

A. Yes, sir.

Q. All right. Now that lease was executed when?

A. August 18.

Q. Of 1952?

[fol. 9355] A. 1952.

Q. How long was it supposed to run by its terms?

A. The 30th day of November, '52.

Q. Now look at it very carefully.

A. Well, it looks like "62," your Honor, on this.

Q. Yes. Doesn't it look like somebody changed that from "52" to "62" in pen in ink?

A. Well, I couldn't say that, Judge, but evidently it would look like it, the way it looks here.

Q. But your recollection, regardless of that document, is that you never entered into a ten-year lease, is that correct?

A. No, sir.

Q. Is that your recollection?

A. That is my recollection.

Q. All right. Now, you subsequently assigned that lease to Nazareth Enterprises, Incorporated, didn't you?

A. Yes, sir.

Q. All right. Now, I show you this document marked Examiner's I in the J. Fried creditor's claim and ask you [fol. 9356] whether this is the document by which you assigned that lease to Mr. Fried?

A. Yes, sir.

Q. Now read that document carefully. What lease does it refer to that was assigned? A lease dated what?

A. This lease was given to them of the lease dated August 18th.

Q. Of what year?

A. Of 1953.

Q. Well, did you have any lease dated August 18th, 1953?

A. Well, it is my supposition that I did, Judge. I believe this particular lease runs to that particular date.

Q. In other words, what you are telling me is that the instrument which you last examined which purported to assign a lease dated August 18th, 1953, was intended to apply to a lease dated August 18th, 1952?

A. No. '52 to run to '53.

Q. Just a minute.

A. You see, this, it looks like 62, your Honor.

[fol. 9357] Q. Forget about the '62.

A. I thought it was '53 to run to that far.

Q. Look at the instrument, which is—I want to identify it for the record.

A. This one (indicating).

Q. Which is Examiner's I in the Jerry Fried creditor's claim.

A. Yes, sir.

Q. Doesn't that state that "You have sold and do hereby assign, transfer and set over unto Nazareth Enterprises, Inc. a certain lease dated the 18th day of August 1953"?

A. It says that there, yes, sir.

Q. All right. All I want to know is, did you have a lease dated August 18th, 1953?

A. I don't remember, sir.

Q. Well, did you have any lease other than Margolis C in the Fried creditor claim?

A. No, sir, I don't believe so.

Q. Now Margolis C in the Fried creditor claim is dated August 18, 1952, isn't it?

A. That is right.

Q. All right.

A. And I have thought it was—the purpose of this one [fol. 9358] I thought it run to the 18th of '53.

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[fol. 9425] Direct examination of Gilbert Sunshine, resumed.

By Mr. Rosen:

Q. Now where did you go after you reached Philadelphia?

A. We went to, I think it is called, Murray Realty, or [fol. 9426] Eddie Malakoff's office, and from there we were taken to the accountant's office, Waldbaum, Rockower & Company.

Q. Who did you go with?

A. In Philadelphia, with Mr. Malakoff and Mr. Fried and Miss Bernstein.

Q. And Mr. Hull?

A. And Mr. Hull.

Q. Was there any discussion in Eddie Malakoff's office when you were there about the debtor?

A. We were there just a very short time.

Q. Then you left from there to go to Rockower's office?

A. Yes, sir.

Q. Did you go by car, do you recall?

A. No, sir.

Q. In any event, you got to Rockower's office in Philadelphia. And who was present in Rockower's office in this early part of December 1952?

A. The same group. And I don't recall whether Mr. Rockower came out himself for a few minutes or not; but basically we conferred with a Mr. Thomas.

Q. When you say the same group, you mean Mr. Malakoff, Mr. Hull, Mr. Fried, Helen Bernstein?

[fol. 9427] A. Yes, sir.

Q. And an assistant?

A. And Mr. Thomas.

Q. And Mr. Thomas. What discussion was had there at that time?

A. They produced a book which—

Q. Can I kindly have the minute book and the stock certificate book and the ledger?

A. That black ledger book.

Mr. Rosen: I have it, your Honor.

Q. I show you in the Saul claim Examiner's B-U and ask you whether this book was handed over in Mr. Rockower's office?

A. Yes.

Q. Do you recall seeing Examiner's I in the Saul claim and being handed over which is the minute book of the corporation?

A. I saw a red book, but they were not given to me, they were given to Mr. Hull.

Q. And did you see Examiner's H or any stock certificate books, do you recall?

A. Certain stock books were given to him as well.

Q. Was there any discussion at the time that those books [fol. 9428] were delivered?

A. Yes. I asked for some information on the corporation and what was in there. And they—Mr. Thomas had his work papers, and from those work papers, where he had already completed the return for the year ending June 30, 1952, he had a balance sheet and a P and L statement. And Mrs. Bernstein copied them. And this is the copy that she brought back.

Q. Were they copied in your presence?

A. Yes.

Q. You saw her make this copy?

A. I don't know if I saw her physically write it. It was written that day. I don't know whether—

Q. Is this her handwriting, do you know?

A. I believe so. I don't know.

Mr. Rosen: I offer it in evidence.

The Witness: I don't know whether it is her handwriting or not.

Mr. Seligson: No objection.

(Debtor's Exhibit X in the Saul claim received in evidence.)

Q. What discussions were had, if you recall, at the [fol. 9429] particular time that these various books were turned over, by whom, and what was said to whom, if you recall?

A. One point I raised was, was the capital correct in the amount of 20 shares of stock and a value of $1500.

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[fol. 9430] Q. Did you have any discussion on the train, and with whom?

A. Again with Mr. Hull and Mrs. Bernstein, if she was there. It is my recollection that she was, but I am not sure.

Q. And what was your discussion?

A. Again about the capital of the corporation.

Q. What was said, if you recall the substance of what [fol. 9431] was said?

A. Basically we—it had been my impression that Mr. Malakoff was to purchase this business for a sum substantially in excess of $1500, and the problem was how could we properly reflect that on the books. And we got nowhere with it on the train.

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[fol. 9432] Q. Did you have any further discussions with any of the parties in interest of the debtor corporation prior to December 12, 1952 which led to your forwarding this letter, Debtor's V?

A. Yes.

Q. With whom, and when, and where, if you recall?

A. With Mr. Malakoff in his office. I endeavored to ascertain from him what he paid for the corporation and the number of people who were going to participate in it.

[fol. 9433] Q. And what was said?

A. He told me that he had paid $115,000 for the corporation—for the stock.

Q. Did he say—

A. —and that he was going to divide it amongst a group of people.

And I asked him the number. And he wasn't specific. And I endeavored to pin him down, and I started counting. And the answer that I got was, when I got to five, it was more than five.

Q. Did Mr. Malakoff say to you that he was going to pay or that he had paid?

A. Presumably he said he had paid, because until he had paid for this corporation the books were never released to him.

Q. Did he tell you that there were other participants in the purchase?

A. Yes, sir.

Q. And did he tell you that the participants in this purchase were more than five?

A. Yes, sir.

Q. I notice that in Debtor's V you refer to a participation by more than five in this purchase by Mr. Malakoff on a pro rata basis. Does that refresh your recollection [fol. 9434] as to the conversation you had with John Malakoff?

A. It meant that these people were buying on an equal basis.

Q. With John Malakoff?

A. Yes. Their shares would all be equal, on an equal footing.

Mr. Seligson: May I have the answer read.

(Answer read.)

Q. Did you have any further discussion as to the books and records showing a $1500 capitalization and what was happening with the moneys of the people that were going in on a pro rata basis with John Malakoff?

Mr. Seligson: One moment. That question is a little bit difficult for me to get.

(Question read.)

Mr. Seligson: If he understands it, I have no objection.

The Witness: I think I do.

A. The discussion that I had with Mr. Malakoff was that if people were to put money into this corporation for stock

the moneys would have to appear in the corporate treasury and that there was no indication that any such moneys [fol. 9435] had been put in.

Mr. Seligson: Wait a minute.

Your Honor, I would like to know what he said to Mr. Malakoff and what Mr. Malakoff said to him.

Mr. Rosen: That is what is saying, Professor Seligson.

The Court: Read the answer.

(Answer read.)

The Court: Is that what you said?

The Witness: Yes, sir.

Q. What did Mr. Malakoff say?

A. He said that as soon as he had completed the final arrangements on who was to come into the corporation, that he would transfer the necessary moneys to the corporate treasury.

Mr. Seligson: Can you fix the time of this conversation?

Q. Yes.

A. Again some time in December or January, 1952, sir.

Mr. Seligson: January '53?

The Witness: '53, I am sorry.

Q. Now, did you have any further discussion in relation- [fol. 9436] ship to this item with anybody else?

A. Yes, sir. I discussed the—I showed the letter that came back from the American Institute of Accountants—

Q. When you say "the letter," you are referring to Debtor's W (showing)?

A. Yes, sir. I showed this to Mr. Malakoff and I explained the problem that was arising, and he told me to contact Mr. Hull and discuss the matter with him further, which I did.

Q. And this is still in, do you recall—

A. This would probably now be in January.

Q. You noticed you received this letter on, apparently it was dated December 18, 1952. Does that help you refresh your recollection?

A. Well, I doubt if anything much was done at the end of December. This came back just before the holidays, and I doubt if anything much was done in December.

Q. So that either somewhere near the end of December or the early part of January you went up to Mr. Hull's office?

A. No, sir.

Q. Where did you meet Mr. Hull?

[fol. 9437] A. I met Mr. Hull for lunch in a restaurant in the 34th Street—the Penn Station.

Q. What restaurant, do you recall?

Mr. Seligson: The Savarin?

The Witness: Very possibly, sir.

Q. Did you have a discussion there with Mr. Hull?

A. Yes, sir; I explained him the problem that was here—

Q. No. Will you kindly—again we would appreciate it if you would tell us what you said and what he said?

A. I explained to Mr. Hull that the corporation reflected 20 shares of stock and $1500 capital, that Mr. Malakoff planned to sell stock in addition beyond that, that no moneys were put into the corporate treasury reflecting anything like that, and that Mr. Malakoff said when he had worked out the arrangements for all the sale that he would deposit the moneys into the corporation.

Q. What did Mr. Hull say?

A. He would take the matter up with Mr. Malakoff and they would resolve it.

Q. What happened next in conjunction with this par-

[fol. 9438] ticular subject matter, if anything did happen?

A. Nothing happened, sir. It was never resolved.

Q. Did you take that matter up again, or do you recall discussing it or requesting that something be done on this matter subsequent, let us say, to January of 1953?

A. I took the matter up once more with Mr. Malakoff.

Q. When and where?

A. Again in his office. And this would have been in the middle of February, somewhere in February.

Q. What did Mr. Malakoff say at that time?

A. That he had not yet completed the final arrangements and that when he did he would see that the entire thing was rectified.

Q. Were you told at any time that Mr. Malakoff was going to put up anywhere from 75 to 115,000 dollars, whether those moneys were given to him by other investors, and that he was to sell the stock to himself at $75 a share and make the profit between the $75 and the thousand dollars a share or $600 a share?

[fol. 9439] A. No, sir.

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[fol. 9440] A. From this book it indicates that the Market must have originally been purchased on April 17, 1951.

Q. When you say "this book," will you please refer to the exhibit?

A. I am sorry. B-V—

Q. Examiner's B-U.

A. Examiner's B-U, I am sorry, Saul.

That the Market must have originally been purchased on April 17, 1951, by Morris Sobel in his own name for a sum of $40,000, plus first and second mortgages and several—and two loans. On that same date—

Q. How much loans and mortgages?

A. There was a first mortgage of $8500, second mortgage of $10,000, a loan due M. Levy for $5000 and a loan due M. R. Company of $2732.99. I think "M. R. Company" stands for Muray Realty.

On that same date the journal entry was made charging [fol. 9441] the Murray Realty loan account and setting up a J. Malakoff capital account. And the explanation in the book reads "To record investment made to M. R. Company."

On August 7, 1951—

Mr. Seligson: I am sorry.

The Witness: Would you care to look at this work sheet with me, Professor?

Mr. Seligson: No.

The Witness: That might be easier.

Mr. Seligson: I think I can get it much better by listening to you. But some of this is not clear to me. I can go over it later. You go ahead.

A. On August 7, 1951 the books were closed and two entries were made at that time, one charging Morris Sobel's

capital account for $38,500 and setting up a capital account for Milton Zoloth of $1500 and a loan account for Morris Sobel of $37,000.

Q. Stop right there for a moment.

A. Can I just read the explanation?

Q. Yes.

A. The explanation reads "To credit correct accounts."

[fol. 9442] Q. Now to your knowledge was there any actual money put in to create this loan account at the time the entry was made in the books?

A. No, sir.

Q. In other words, it was merely a book entry?

A. Yes, sir.

Q. And originally it was capital?

A. Yes, sir.

Q. Proceed.

A. There was also another entry made charging Jack Malakoff's capital account for $17,489 and transferring it to his loan account. Again the explanation, "To credit the correct accounts."

Q. From the records, from your knowledge as an accountant was that money actually put in as rent or was that a book entry?

A. It again appears to be a book entry.

* * * * * * *

[fol. 9447] Q. Will you give the Court your opinion of the various book entries and what they reflect, as far as your interpretation is concerned?

A. Briefly, it indicates that an individual purchased the business from somebody; the source is not indicated; and that he had one or more partners in this venture, and that when he reached a certain point they decided to incorporate this business, and I would think that going with the tax thinking that prevailed in that day, that they endeavored to show the largest sum for loans imaginable, to endeavor to minimize their tax liability if and when one would be due.

Q. So originally those loans were capital?

A. It appears so. Not all, but most of them.

Q. And it was merely a bookkeeping entry, no actual money was put in as loans in a material sense subsequent [fol. 9448] to the time of this so-called capital investment in the partnership?

A. If it was, I just don't see any indication of any substantial sum along those lines.

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[fol. 9450] Mr. Seligson: Is this the transcript of the loan account or the exchange account?

The Witness: The exchange account, sir.

Mr. Seligson: In other words, there were separate loan accounts?

The Witness: The exchange account is separate and distinct from the loan account I previously described.

Mr. Seligson: No objection.

(Marked Debtor's Exhibit Y in the Saul claim.)

Q. At various times it appears from Debtor's Y that [fol. 9451] John Malakoff overdrew on this loan exchange account. Did he ever request or direct you to credit him with any of the overdraws on the other loan account?

A. No, sir. This account was kept as a separate account. He kept a running balance of his own and checked with me each month.

Q. On this account was there a balance due the corporation from Mr. Malakoff?

A. Yes, sir.

Q. What is the balance due?

A. $3,898.25.

Q. Were you ever asked to credit that by Malakoff to the other loan account?

A. No, sir.

• • • • • • •

[fol. 9459] Q. To your knowledge, both from your checking various bank statements as well as the books and records of Nazareth Fair Grounds & Farmers Market, Inc., is there any evidence or any proof or did you come across any fact which shows that any of the moneys that Malakoff received for the sale of interests or stock in this venture of Nazareth Fair Grounds & Farmers Market, Inc. was

[fol. 9460] put into the corporate treasury or the corporate account?

A. No, sir.

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[fol. 9548] Cross examination.

By Mr. Seligson:

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A. Originally it was in the capital, and his capital account was decreased by the two items plus the loss that the partnership incurred for the period of its operation, leaving a net balance in the partnership capital account of $823.56, and then subsequently when the corporation was formed that $823.56—$750 of it was put into corporate capital and the balance was transferred to the individual loan account.

Q. You mean that in the partnership records there was a capital account for the partners?

A. Yes.

[fol. 9549] Q. And in that capital account the total amount that was contributed—

A. May I stop you, sir?

Q. Yes.

A. Initially there was this capital account for Milton Sobel as an individual.

Q. All right. Well, let us go back.

Cross examination.

By the Court:

Q. In what amount?

A. $40,000.

Q. Exactly. Now, the error, or the basic question that the Professor asked was what was wrong? Am I to understand that one of the things that was wrong was that there was no evidence to substantiate the transfer from Sobel to Zoloth?

A. Well, it was just arbitrarily transferred.

The Court: That is what you were driving at, Professor?

Mr. Seligson: Yes.

Q. Let us start off here: Who had that $40,000 capital account to his credit in the partnership?

A. In the individual's name was Milton Sobel of $40,000.

Q. All right. What happened to that $40,000?

[fol. 9550] Mr. Seligson: Your Honor, before we get to that I would like to find out how we get that $40,000.

The Court: All right.

Cross examination.

By Mr. Seligson:

Q. Now, you say that the business was purchased originally by Maurice Sobel?

A. It appears that way, sir.

Q. From the records it appears that way?

A. Yes.

Q. I am only talking from the records. You have no independent knowledge, do you?

A. No, sir.

Q. And that was on April 17, 1951?

A. It may have been purchased prior to that, but that is the date shown in this book.

Q. Now, how much was paid by Maurice Sobel for the building and business?

A. I can read the opening entry to you, sir: Building, $66,000; building settlement costs, $456.50; insurance, $45.78; taxes, $39.69. Those are the total debits.

Q. And that makes a total cost of land and buildings of how much? $66,541.97, is that correct?

A. You are faster than I am.

[fol. 9551] Q. No, not faster. You give me your report.

A. That is so. There was—

Q. Let us get that first. Is that right?

A. Yes, sir.

Q. Now, what was due against that?

A. Taxes of $45.48; mortgage interest of $263.50; first mortgage, $8500, second mortgage $10,000; loan, M. Levy, $5,000; loan M. R. Company, $2,000; $732.99; M. Sobel capital.

Q. That makes these liabilities a total of $26,541.97?

A. That would be right.

Q. And if you deduct that from the purchase price you get this balance of $40,000, which is set up as capital?

A. Yes.

Q. For Maurice Sobel, is that it?

A. Yes.

Q. Now, is there anything in these records that leads you to believe that $66,000 was not paid for the land and building?

A. No, sir. There is nothing here to indicate that it was, either.

• • • • • • •

[fol. 9593] Q. Did John Malakoff tell you in this conversation that he intended to issue more stock?

A. Yes, sir.

Q. Did he tell you to whom?

A. No, sir.

Q. Did he tell you at what consideration?

A. No, sir.

Q. Did you ask him?

A. Yes, sir.

Q. What did you ask him? What did you say to him?

[fol. 9594] A. I asked him specifically, how much and to who, if he knew, and for what, and the amount of shares.

Q. What did he say?

A. I didn't get an answer, sir.

Q. Did John Malakoff tell you that he wanted the balance sheet of the corporation to reflect an investment of $115,000 by him?

A. He wasn't sure what he wanted it to reflect, sir. I stated to him that if stock were sold and this money was due to the corporation, that those moneys would have to be deposited in the corporation.

Q. Wait a minute. You stated to him that if stock were sold and the moneys were due to the corporation—

A. Right.

Q. —that the moneys would have to be deposited in the corporation?

A. In the corporate treasury.

Q. Did he tell you that he intended to sell stock, unissued stock?

A. Yes, sir.

• • • • • • •

[fol. 9597] Q. Now after you got the reply, which has been marked Debtor's Exhibit W, I understand you spoke to Mr. Malakoff about it?

A. And Mr. Hull.

[fol. 9598] Q. Well, first Mr. Malakoff; isn't that what you said?

A. Yes.

Q. And then he referred you to Mr. Hull?

A. Yes.

Q. And after you spoke to Mr. Hull, did Mr. Hull give you any instructions?

A. No, sir.

Q. What did he say?

A. He would go back and discuss it with Mr. Malakoff and when they had ironed out that end of the situation as to whether the number and the amount and the shares that were to be issued, they would sit down with me once more and we would try to resolve the problem.

Q. When did Mr. Hull tell you that? Well, was it shortly after the letter came in?

A. I would say the beginning of 1953.

Q. January 1953?

A. January or February, sir.

• • • • • • •

[fol. 9613] Cross examination.

By Mr. Rosen:

Q. Mr. Sunshine, let me ask you a question in this manner, if you please: Will you kindly look at Examiner's JJ and will you tell me whether after examining Examiner's JJ whether in the Sobel situation it appears that Mr. Sobel

was paid out from the moneys from the moneys received from John Malakoff on this $40,000 capital investment or loan?

A. It would appear so from this sheet.

Q. So that out of the total amount that you previously testified Malakoff paid on this particular deal, it appears that $40,000 of that amount went to Sobel?

A. Yes.

Q. In reduction of this $40,000 capital investment or loan?

A. This only shows $36,000.

Mr. Seligson: What is that?

The Witness: This only shows $36,000. Thirty-five and one thousand totaling 36,000.

Mr. Seligson: That exhibit shows that money going to Sobel?

The Witness: Yes, sir. 35,000 on one page and a thousand on the other.

Q. Now, there has been some testimony that the Sobel loan was carried over into the books of Nazareth Fair [fol. 9614] Grounds and Farmers Market, Inc. and was carried over as a loan. I am starting with the original $40,000. How much of that $40,000 was carried over as a loan into the books of the Nazareth Fair Grounds & Farmers Market, Inc.?

Mr. Seligson: Your Honor, unless there is some special purpose, this has been gone over on three separate occasions.

Mr. Rosen: There is a special purpose.

Mr. Seligson: Mr. Robbins and I have gone into that very, very carefully.

The Court: I will allow it.

A. Of the $40,000, $37,073.46 were transferred on the corporation's books to M. Sobel loan account, $73.46 to Milton Zoloth loan account and $1,500 to the capital account.

Q. Now, the $37,000 then was transferred over on the books to John Malakoff, right, of this original forty?

A. That plus the $73.46.

Q. So as far as the books and records of the debtor, they still reflected—

A. That original $40,000.

Q. That had been paid Sobel, $37,000-odd as payable to [fol. 9615] John Malakoff?

A. Yes, sir.

• • • • • • •

[fol. 9616] Q. Now, can you refresh your recollection whether in this conversation with John Malakoff there was any statement made by John Malakoff that he was entitled to draw various sums of money for handling this transaction?

A. In the course of our original discussion he disclosed that he had contemplated getting—I don't know what you call it—a management fee, or what you would call it, for supervising the operation of the Market plus whatever expenses he had on it.

Q. Now, originally when you discussed the question of the sale of the stock of Nazareth Fair Grounds & Farmer Market, Inc., and I refer you to Debtor's V, next to the last paragraph thereof, regarding the acquisition by more than five others on a pro rata basis, didn't Malakoff tell you he wasn't in this thing merely to give everybody the same deal as himself, that he was looking to make money?

[fol. 9617] Mr. Seligson: Your Honor, I object.

The Court: Sustained.

Q. I ask you to look at Debtor's V, the last paragraph thereof, exclusive of the words "your comments," and tell me whether that refreshes your recollection as to what John Malakoff said he was to get out of this deal?

Mr. Seligson: I object to the question. There has been no testimony—

The Court: Sustained.

Q. In response to the Examiner's cross-examination you spoke about a conversation you had with John Malakoff, is that right?

A. Yes, sir.

Q. Do you recall whether you had any further conver-

sation with John Malakoff at that time regarding his contemplated sale to more than five stockholders on a pro rata basis? What else, if anything was said?

A. Merely what it says here, that he contemplated that he had already divided the acquisition among more than five people and that they were going to share on a pro rata basis.

Q. That is inclusive of himself?

A. Everyone was.

[fol. 9618] Q. Did you thereafter have any further conversation on a later date regarding that matter?

A. Only to find out if he had done anything with or about Nazareth, to which I never got a response.

Q. Did you discuss with him and did you request that he put into the corporate treasury the moneys for the stock that he sold?

A. I did.

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[fol. 9619] Q. Did you have a conversation with Malakoff in any form regarding, or as to what Malakoff was to get out of this situation?

A. Just what I said before.

Q. What was that?

A. That he was to get a fee, a management service charge or salary, or whatever it was going to be decided on, plus expenses that he incurred.

Q. And that is what he told you?

A. That is right.

Q. And do you recall when that was told you?

A. Probably around the beginning of 1953; maybe the end of 1952.

• • • • • • •

[fol. 9767]

COLLOQUY BETWEEN COURT AND COUNSEL:

The Court: All right, Mr. Weinstein, will you stipulate on the record that you purchased stock of the debtor subsequent to the date upon which I ordered that you be paid compensation?

Mr. Weinstein: That is the fact.

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[fol. 9768] The Court: I know that. I am asking you a simple question. Will you stipulate that you acquired, by purchase, stock of the debtor corporation at a date subsequent to the date upon which I originally fixed your compensation.

Mr. Fried: Yes, sir.

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[fol. 9770] The Court: Mr. Fried, do you now stipulate that you are the sole stockholder of Nazareth Enterprises?

Mr. Fried: I said I was the controlling stockholder, your Honor.

The Court: How much of the stock do you own?

Mr. Fried: There are two shares issued of a hundred.

The Court: Well, how much of the issued outstanding stock do you own?

Mr. Fried: I only say it is my own because my wife and I own both shares of stock.

The Court: Severally?

Mr. Fried: Yes.

The Court: Each owns one share of stock?

Mr. Fried: That's right.

[fol. 9771] The Court: Now, what is your relationship officer-wise to Nazareth Enterprises, Inc.?

Mr. Fried: I am the president, your Honor.

The Court: Now, apparently Mr. Fried says that he doesn't own—it is not a wholly-owned corporation so far as he is concerned. He owns one share, and his wife owns one share of two issued shares of 100 authorized shares of stock.

• • • • • • • •

The Court: To wit, that he owns 50 per cent of the outstanding and issued stock, and that he is the president of the corporation and has been president throughout all the time involved herein.

Mr. Robbins: Well, the other fact is important.

The Court: That his wife owns the remaining 50 per cent?

Mr. Robbins: Right.

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[fol. 9841] The Court: All right, I will restate my question. Is there anything in the Bankruptcy Act which requires that an officer be removed because he trades in the stock of the debtor?

Mr. Robbins: Your Honor, the answer is no. There is nothing in the statute that requires his removal.

The Court: Now, that would include, therefore, that a violation of the proscription of 249, while it might involve no allowance either by way of salary or anything else or allowances to fiduciaries, it does not necessarily follow that a violation of 249 requires the removal of an officer. Isn't that so?

Mr. Robbins: That is right, your Honor.

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[fol. 9885] Direct examination of
Wilson D. Rehrig.

By Mr. Weinstein:

Q. Did you originally tell Mr. Philip all you wanted to spend for space in the grandstand building was $6200?

A. I might have said that was enough to spend, which was very—

Q. In your view that was sufficient for that space?

A. That is right.

Q. That is all you felt it was worth. Is that right?

A. That is right.

Q. And you told that to Mr. Philip. Is that right?

A. It could be right.

Q. And you instructed him to negotiate on that basis, didn't you?

A. That is right.

Q. Did there then come a time when it was reported back to you that management did not want to give you that lease for $6200 in view of the fact that we felt the space [fol. 9886] was worth more? Did that get back to you?

A. Yes, sir, and we had agreed upon $7500 later on.

Q. And when you say agreed upon, you mean to say that you had made up in your own mind that $7500 would

be acceptable in so far as you were concerned. Is that right? In other words, that was as high as you were going to go?

A. Well, I thought it was mutual.

• • • • • • •

[fol. 9888] Q. At all events, the highest offer that you had made for space in the grandstand building was $7500 plus, as you say, making some improvements. Is that right?

A. Quite a bit of improvements. It would cost about $7000, close to $7000, which I did spend later on.

• • • • • • •

[fol. 9890] Q. So that whereas you felt that you were not going to pay more than $10,000 as rental here, you took [fol. 9891] up the Judge's offer of $15,000, didn't you?

A. Because I had all my eggs in one basket.

Q. Never mind because, please; you took it up, didn't you?

A. Yes, sir.

Q. And you accepted it?

A. Yes, sir.

Q. And you have been doing business on that lease all the way through, haven't you?

A. Yes, sir.

Q. So that from your original lease of $6200, which commenced along about Labor Day of 1956, your present rental and the rental that you have been paying since 1958 on has been $15,000. Is that so?

A. Yes, sir.

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[fol. 9957] Cross examination.

By Mr. Rosen:

Q. Did you want any other competitor to come in the market outside of yourself in the meat business?

A. No.

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[fol. 9966] Q. I ask you a simple question: Mr. Rehrig, isn't it the fact that the reason to buy the additional stock

was to try to get the majority ownership, not to be a minority stockholder?

A. After I could not even get a voice, yes.

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[fol. 9995] Redirect examination.

By Mr. Weinstein:

Q. You just told Mr. Margolis, didn't you, that you felt that $10,000 was plenty for the space that you now occupy? Didn't you say that?

A. Yes, sir.

Q. And if you could use that voice on behalf of the debtor, you would not ask or try to get from yourself any $15,000, would you?

A. Not for that spot, no, sir.

Q. In other words, you would prevent that in so far as you were concerned; you would serve your own self-interest, pay only $10,000 despite the fact that you might get $15,000 on behalf of the debtor. Isn't that right?

A. Yes, sir.

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[fol. 10013] Melvin Lloyd Robbins, called as a witness in behalf of the respondents, having been first duly sworn, testified as follows:

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[fol. 10014] Direct examination.

By Mr. Weinstein:

Q. Mr. Robbins, you are the attorney representing Mr. Rehrig, are you?

A. That is right.

Q. And you have been representing him for some time, have you, in connection with this Nazareth Fair Grounds litigation?

A. Yes.

Q. Do you represent him on this particular hearing?

A. Yes, sir.

Q. You were in court yesterday, were you?

A. Yes.

Q. And you were representing Mr. Rehrig, weren't you?

A. Yes.

Q. Now, then, do you recall yesterday, during the course of the proceedings, you made a statement to this Court, and I quote, "These people are guilty of grand larceny"? Do you recall making that statement?

A. I recall making a statement that we had made serious charges of grand larceny.

[fol. 10015] Q. And also in connection with the statement that you say you made, were you referring to "these people" meaning Mr. Fried and myself?

A. Yes.

Q. And those charges of grand larceny refer to Mr. Fried and myself. Is that correct?

A. That is quite correct.

Q. Mr. Robbins, would you please produce any factual evidence or proof that you have that, as a consequence of any grand larceny that I committed in connection with the racetrack operations as you have alleged them in your petition on behalf of the petitioner, I received any cash, any check, any bond, security or thing of value?

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[fol. 10017] A. First of all, that petition is signed by me, which is an attorney's certification under Rule 11. So I am as much bound by it as the petitioner, Irving J. Wolf.

Secondly, I served on you, among others, a memorandum or schedule of testimony and exhibits which were incorporated by reference, and those pages and those exhibits contain in detail the information on which I based that petition when I drafted it, and that is all I know. Every single thing I know is in this record, and that is all I know.

The Court: Will you respond to the question, please. Mr. Weinstein asked you can you state any instance where he, Mr. Weinstein, received, and then he enumerated things of value, in connection with the operation of the racetrack.

The Witness: The answer to that, your Honor, is no.

The Court: All right, now my question. Can you state any instance where Mr. Weinstein aided or abetted or conspired with anyone else to receive anything of value [fol. 10018] in that connection?

The Witness: Your Honor, I refer to the testimony by Mr. Fried and Mr. La Grotte, which is referred to in the memorandum I just referred to, where my recollection is that Mr. Fried said that he had consulted with you, with Mr. Weinstein, and told you about the rent arrangements, both on his own failure to pay his proper rent on the racetrack lease, and on his having taken the La Grotte rents on the Sunday operations for himself instead of turning them over to the market.

By Mr. Weinstein:

Q. In connection with that latter portion about which you just spoke, do you have—and if you do—please produce it—any proof, any evidence, any facts, which would indicate that I received anything of value in connection with the statement that you just made about incorporating into evidence and referring to other proceedings or statements on my part in connection with the racetrack?

A. Nothing whatsoever.

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[fol. 10027] Arnold A. Weinstein, called as a witness in behalf of the respondents, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Weinstein:

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[fol. 10029] The Witness: • • •

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Thereafter, it was my policy, and I actually did make weekly trips to Nazareth, Pennsylvania, and during the [fol. 10030] first year or year and a half of those trips, they were for the most part trips made twice a week for the purpose of supervising the operation, examining into the operation, and to seek in every way possible to build this business up. Also to make order out of chaos wherever that could be done.

At the time of the filing of the petition and its granting in September of 1953, the debtor was insolvent. It couldn't meet its obligations when they became due. The credit of the debtor was practically nil. From my observation and speaking with people in and around the area of Nazareth, its reputation for respectability, especially in financial matters, was of the very, very lowest.

The operation itself—that is to say, the operation of the debtor's business in connection with the renting of space—I found that there was a poor class of merchants there. They were people who to my then unpracticed eye did not know the first thing about retailing, and I discussed that situation with Mr. Fried, and we adopted a number of policies.

The principal policy that we adopted at that time, and which we sought to put into effect was a program designed [fol. 10031] to educate the merchants who were there for the purpose of getting them to display their merchandise properly. For example, merchandise was being sold off old, broken and dirty tables. In company with Mr. Fried, and I should say that Mr. Fried did the vast majority of this type of work—I did it when I was out there only once or twice a week for the hours that I was there—we would go around to merchants and plead with them please to put a skirt or other attractive covering over these tables; point out to them that the attractive method which they might use to display their merchandise would attract more customers to them.

We also adopted the policy, and we kept directing our remarks out there to all these merchants, of trying to establish a reputation in and around the area of having the lowest prices in the entire community, and by community I mean anything within an area of possibly 30, 40 or 50 miles. So that people would have something to come to in so far as Nazareth was concerned, bearing in mind its old and dilapidated physical aspect and structure.

At that time there were on the premises three buildings. One of them was a great Dutch barn-like structure, very, very high ceiling. The building itself was probably four [fol. 10032] stories in height. also probably 75 years old

if it was a day old, rickety, cold, drafty, dirty, and we had to have something to attract people to come to Nazareth.

We struck on the idea of these cheaper prices, the quaintness of the atmosphere, bearing in mind that there were many Amish people, who were retailing merchandise there, that there are many Pennsylvania Dutch people in the vicinity, and that these people might find it attractive to come there because of these cheaper prices.

Now, during this time I spent—and this is general throughout the entire term of my office in so far as visits to Nazareth are concerned—as a general rule, I would leave New York City somewhere around 12 or 1 o'clock in the afternoon. I would get out to Nazareth some time around 3 or 3.30, depending upon traffic conditions. I would stay in Nazareth doing those things which I thought were necessary in connection with its promotion, discussion with Mr. Fried, observing Mr. Fried, checking on his activities, moving tables around, speaking to merchants, and I would stay there until along about 9, 10 o'clock at night, when I would leave and return to my home in Forest Hills. I [fol. 10033] estimate that the round trip is somewhere between 180 to 200 miles. From Nazareth to Forest Hills would take me somewhere in the neighborhood of two and a half to three hours in actual travel time.

Now, during this year and a half from September of 1953 until along about April or May of 1955, I performed these services in connection with the operation, supervision, promotion of the debtor, assisting Mr. Fried and supervising Mr. Fried, because the bulk of the work was actually done by him.

I did that without compensation whatsoever, other than the fact that I did receive from the debtor my travel expenses in going to and from Nazareth. I didn't always take those travel expenses. In many instances, because of the dire financial straits in which this debtor was, I paid my own money, paid my own expenses, and it was on some occasions that I did get the expenses that I actually had out of my pocket in going into Nazareth and back to New York.

During that period of time, we also adopted a policy of a money-back-if-not-satisfied. Now, this money-back policy if

[fol. 10034] not satisfied that we inaugurated at Nazareth was money back by the debtor in the event that people were dissatisfied with anything that they might have purchased in Nazareth.

At that time, as I pointed out, the merchants as a general proposition were of low caliber. They didn't quite understand the virtue of reliability, of standing behind their products, and we were trying to establish that kind of reputation in so far as Nazareth was concerned.

In connection with that, I remember on many occasions when I was in the office with Mr. Fried, discussing the very, very many problems which we had, which included keeping creditors off our backs, trying to keep creditors happy, pushing one off, paying one, postponing another, to keep this ship from rocking too badly so that it would sink completely, there would be many occasions when people would come into the office and complain that Mr. X or Mr. Y, from whom they had purchased merchandise, had sold them or they didn't get what they were supposed to get. I used to refund money out of my own pocket to these people. I saw Mr. Fried refund money out of his own pocket to these people, and they went off happy, and they [fol. 10035] went off satisfied. We would try to get reimbursement in so far as the individual merchants were concerned, but in most instances, we met with failure.

When matters like that kept repeating, we tried to weed out this bad type of merchant so that we would get people in there who would satisfy us in our desire to set up this market the way we wanted it to be set up.

While all of this is going on, I had at the same time the burden and the obligation of complying with the order of this Court in the payment of the obligations of the debtor in so far as the actual issuance of checks in payment of those obligations was concerned. Weekly I prepared an affidavit with respect to every expenditure which was made by the debtor. I examined all of the check vouchers in payment of these obligations. I checked through them. Where there was any doubt in my mind as to any of these payments, I would check either with Mr. Fried, with the accountant, and there were many times that I had to make

those checks, delivered those checks to Referee Joyce, who was designated to countersign all checks, left them there, picked them up the following day or the day after, brought [fol. 10036] them back to the office, sent them out to Nazareth by mail, or if I was going out the following day, then I would take them out with me.

I would say that the matter of checking into the payment of the debtor's obligations, preparing an affidavit, submitting it to Referee Joyce, checking it up after he had countersigned the checks, would take me every single week, would consume approximately two hours of my time. And that I think is an underestimate.

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[fol. 10038] Direct examination of Gilbert Sunshine.

By Mr. Weinstein:

Q. Now, then, would you direct your attention to the report for the year ended June 30th of 1953?

[fol. 10039] A. Gross income for that year was $56,633.58. The profit for that period was $11,192.13, after provision for depreciation of $4200-odd. In addition, that profit was predicated upon the recoupment of an insurance claim of $11,811.78, which sum never was received by the debtor.

Q. Will you turn to the report for the year 1954, ended June 30th?

A. The gross income for that year was $61,949. The profit at that time was $2,317 after depreciation of $5,100 or a total profit of $7,376.

Q. Will you repeat the same information in so far as the following year, 1955, is concerned?

A. The gross income at that time was $66,558. The profit was $8,442. There was approximately $6,600 in depreciation, or a total of $15,088.

Q. And for the following year, 1956?

A. The gross income in 1956 was $78,981. The loss for that period was $531 after depreciation provision of $7800 or a net profit of $7243.

Q. Now, you said something about the year 1957 with respect to some scratch sheets that you have?

A. Yes. I took the wrong sheet with me.

Q. Can you tell us from the sheets you do have what the [fol. 10040] situation was with respect to that year?

A. The gross income was $94,578. I am not sure which is which, but I think the profit was $3,298 and the provision for depreciation was $3,693, bringing it up to a total of $6,982.

Q. That report covering the year 1957, covered the period of August 28 of 1956, did it not?

A. Yes, July 1, 1956 to June 30, 1957.

Q. This corporation runs on a fiscal year basis. Is that right?

A. Correct.

Q. And the date that I mentioned to you, do you not know was the time when the premises of the debtor were substantially destroyed by fire?

A. That is right. That figure includes the rental insurance that we collected from the insurance company.

Q. Would you say that in light of the fact that there was this fire and in light of the fact that we collected rental insurance, and had other incidental expenses in connection with the operation of the premises, and the damages as a consequence of the fire, that that figure that you gave us is not a truly representative figure of the debtor's oper- [fol. 10041] ations for that year?

A. Well, it was not a representative year because we only collected approximately six or seven months, when we had no activity whatsoever, nothing but expenses.

Q. The following year would be 1958, would it?

A. That is right.

Q. Would you please give us the information on that?

A. In 1958 we had depreciation of $15,000. I should have gone back. The income in the year 1958 on an adjusted basis was $146,014. The profit for the period was $44,032. Depreciation was $15,000, which would be a total of $59,000. From that figure, $18,000 would have to be subtracted from the adjusted rents, which were never actually collected in cash to show the net cash position of $38,000, $38,000 cash profit.

Q. With respect to those adjusted rents that you just mentioned, would you explain to the Court what you intend to convey by the expression "adjusted rents"?

A. Adjusted rents means that certain advance rents had been received from tenants under lease and under other [fol. 10042] arrangements under the building program, and these were being amortized by reduced monthly rents received in cash by the debtor.

Q. So the adjusted rentals are the actual rentals received in cash for the period. Is that the idea?

A. That is right.

Q. And constructively in that particular period, had there been no advance payment of rents by any of these tenants, the figure for rental collections would have been higher. Isn't that correct?

A. That is right.

The Court: Are the figures for 1959 available?

The Witness: Yes, sir.

Mr. Weinstein: I am coming to that.

Q. With respect to the year 1959, would you give us the same information as you did for the previous years?

A. The gross cash rents were $158,460. On an adjusted basis they were $167,966. The profit for the period without the rent adjustment was $15,352. Provision for depreciation was $16,400, and the adjusted rent difference was $9500. Total profit was $41,269. This would have been [fol. 10043] after a payment for interest of $8900, the prime portion of which was applicable to the first mortgage that had been obtained. In the previous year there had been a similar payment of approximately $7000 for interest.

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Q. At the early stages of this reorganization, back in September of 1953, do you know whether or not in connection with the operation of the debtor's business and the [fol. 10044] payments of its bills, whether it was ever in a position to obtain purchase discounts on any items for which an expenditure was incurred?

A. Not with maybe an isolated example up until I think the year ending June 30, 1958, and that year we took in $45.75 in purchase discounts.

For the year ending June 30, 1959, the discounts rose to $750.94. And during that period, my recollection is that every bill has been discounted.

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Q. Have you noticed in your visits to the Nazareth Market from time to time, for the purpose of auditing its books, whether there has been any change in the type and the character of the operation out there as regards rentals, leasing, persons in attendance or the like?

A. The market is no longer run as an itinerant business, which is what it was when this debtor first went into reorganization. There are a number of lease tenants. There are a goodly number of tenants on a percentage basis, [fol. 10045] and the number of tenants who come in for one month and disappear has been reduced tremendously.

The ratio of occupancy is up considerably. It is well beyond the 80 to 90 per cent. The amount of money coming in from rent collections is reasonably constant. We don't have the great rise and fall where we would collect money one month and the next month it would drop down to nothing, and we would wait for the few months in the summer for some money to come in.

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[fol. 10055] Cross examination.

By Mr. Rosen:

Q. Did you have a discussion with Mr. Fried and Mr. Weinstein as to why the reduction was being made in a rental of 15 per cent down to 10 per cent?

A. Not only in his case, but in any others that come to my attention where rents are reduced.

Q. In other words, there were other instances where rents were reduced for tenants here?

A. It was constantly happening.

Q. Explain it to the Court. Tell us why they were reduced in some instances, why that was done in the custom and operation of the business?

A. In many instances, tenants, in order to maintain them, if they weren't profitable, and it was believed to be in the

interests of the operation of the market to keep the tenant in the property, concessions were made to many tenants over a period of time.

Q. In other words, would this be correct:

If you had a vegetable man operating and it appeared that he couldn't maintain the rent that was agreed upon, that an adjustment was made in order to keep him in the premises and keep the premises rented?

A. Yes, sir.

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[fol. 10066] Cross examination.

By Mr. Robbins:

Q. Did you ever discuss it with Mr. Seligson?

A. I don't know. I think Mr. Mandel was aware of it.

Q. When was that?

A. When he came into the case.

Q. Can you be any more specific about that?

A. No, sir. Mr. Mandel asked an awful lot of information when he first came in here, and he went into the subject of the lease of the racetrack, and I am sure it was called to his attention, but I can't tell you when or how. Most of our conversations were on the phone.

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[fol. 10094] ARNOLD A. WEINSTEIN, resumed.

Direct examination.

By Mr. Weinstein:

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[fol. 10096] The Witness: We planned a structure which would connect the two buildings that I described, and for the reasons that I gave previously. Plans were drawn. This Court was asked for approval to put up this building. In connection with the putting up of the building, I arranged for a client of mine to advance some $16,000 or $17,000 or $18,000 on the security of a third mortgage. I

made no charge to the corporation for that. The money was loaned. We put this building up. I think the cost was $32,000. Its replacement value for insurance purposes was something in the neighborhood of $60,000 to $70,000, for which we carried insurance, and we put this structure up.

Mr. Fried superintended that construction for the most part, if not completely, and we put this building in operation.

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[fol. 10097] I estimate, based upon the figures that I have seen, knowing about the cost of operation being $32,000 and the replacement value of some $60,000 or $70,000 on the basis of which I might say by anticipating myself, that it was on the basis of I believe $60,000 to $70,000 that we settled a fire loss on that building a year or so later, but as a consequence of that construction, this debtor not only got [fol. 10098] the benefits of the construction of eliminating fluctuating income, but in addition it got a building worth 60 or $70,000, and in that respect having only cost the debtor $32,000, I feel that the estate itself was enhanced by the difference between those two figures.

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[fol. 10100] We then come to the period of 1956, and I [fol. 10101] should say that throughout the entire period of my being the president of this corporation that, weather permitting, my health permitting, and possibly the health of my family permitting, I have gone out to Nazareth checking over the operation, speaking with Mr. Fried, speaking with tenants, going over the advertising, suggesting whatever I possibly could to him to improve wherever possible the operation that we were conducting.

The Court: How frequently?

The Witness: I would say, your Honor, that on the average that would be once a week, once in nine days, depending upon how the situation turned out.

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[fol. 10104] Mr. Fried began to scout around with plans, consulting architects, consulting material men, consulting

excavators and all those individuals who would go to put up a structure, and checked back with me.

We finally got to the point where we applied to the Court for permission to put up a new structure larger than the one that we had before containing, I don't know, somewhere in the neighborhood of 60, 65,000 square feet, and the figure that it cost us actually to put up this new structure approximate about $220,000.

This is to be compared to estimates that we had received from Bethelehem Steel Company, I believe it was, and some other people who were engaged in the construction business in and around that area, estimates which ranged for the exact same structure Mr. Fried superintended and actually put up, estimates ranging as high as $450,000.

The fact of the matter was that despite expert testimony given in this court on the hearing with respect to the reconstruction, a witness brought in by Mr. Margolis I believe, who testified that that building could not be put up [fol. 10105] much less than $6 a square foot, which would have put that cost at somewhere in the neighborhood of $360,000, nevertheless, we—when I say we, it is 90, 95 per cent Mr. Fried and maybe 5 per cent myself as far as construction was concerned—got this thing up for $220,000.

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[fol. 10115] I should like to conclude that branch of my testimony by saying that other than any Court approved payments which I might have received from the debtor beginning in April or May or so of 1955, I did not receive one single, solitary cent out of the operations of the debtor, that I made nothing out of any lease arrangements. I made [fol. 10116] nothing out of any of the unauthorized transactions about which much has been made here, and that everything that I have done has been with only one thought in mind, and that was to build up this debtor for one thing and, second, to get it out of reorganization as quickly as possible so that the debtor, its stockholders, could make some money out of this thing after so many years of waiting. It is the only thing I have had in mind.

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[fol. 10121] The Witness: I had concluded yesterday's testimony at the point where I stated that Mr. Robbins represented himself to myself and Mr. Rosen as the attorney for Wilson Rehrig, a tenant who had purchased some stock in the Market; that he wanted to ascertain whether or not some sort of lease arrangement could be entered into in so far as the debtor was concerned with Mr. Rehrig.

So in line with that and in line with an arrangement that [fol. 10122] had been made by Mr. Robbins and with Mr. Robbins, we went out to Nazareth. I met with Mr. Robbins, Mr. Philip, who is Mr. Rehrig's Pennsylvania lawyer, Mr. Fried and myself in a diner which is substantially across the street from the Market out there. And we began to talk lease.

Preliminarily, as I recall it, Mr. Philip, I should say, undertook the laboring oar, and he offered $6000 for the space that Mr. Rehrig was then occupying, and he was looking for a long term lease. By long term I think there was something mentioned about maybe five years, maybe ten years, somewhere in there.

The Court: Just to refresh me on this, when was this meeting?

The Witness: This meeting, your Honor, was somewhat before the summertime of 1957. I recall it was at a time—

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[fol. 10123] The Witness: And, as I say, there was this talk about possibly negotiating out a longer term lease. In the course of the conversation, Mr. Philip suggested that Mr. Rehrig might also require some additional space and a 12-foot area was mentioned.

That 12 feet would have amounted to approximately 450 to 480 additional square feet because it would have been 12 feet in length by approximately 39 or 40 feet in width, which was the width of the grandstand building.

Well, at that point Mr. Fried and I resorted to some quick figuring on a sheet of paper, and we said something to the effect that, well, if that additional space were required, the rental for it would and should be $7200 a year.

The Court: For the entire?

The Witness: Yes, for the space that he then occupied with the additional space which was requested.

When that figure of $7200 was mentioned, Mr. Philip became very, very excited. He said to Mr. Fried, "What are you trying to do? Are you trying to sandbag me and [fol. 10124] push me around the way you are pushing around other merchants?"

He said, "Listen here, young fellow, you can't do that to me," in words or substance. He said, "I know all about you."

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I finally got a little order restored there, and I said, "Look, fellows, let us sit down here and see if we can't talk this thing over reasonably." And I addressed myself to Mr. Robbins. I said, "Look, you are asking for some additional space. Mr. Fried and I just calculated out what we thought was the additional amount of money that you ought to pay."

I said, "Now, I want you to understand that this is based substantially on similar rentals which are being paid [fol. 10125] by another butcher in the Market." At that time I think the butcher was Steever & Achey.

And I believe that we measured out for him some of the space that Steever occupied there, and we pointed out to him that this was what we considered to be fair under all of the circumstances.

Well, there was no holding Mr. Philip in check. He said to Mr. Fried, "Look, I am not going to buy any of that kind of nonsense here at all."

He said, "Wait until I get through with you." He says, "I am going to blacken you. You are going to give me the lease I want."

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[fol. 10126] The conversation finally got back to this Rehrig lease situation, the Rehrig general situation. Mr. Robbins said, "Look here, I am representing a client here."

He said, "I have got to get a lease."

He said, "I want you to know that if I am going to represent this client, I am going to keep this reorganization in [fol. 10127] existence and delay it long enough to tire out

every single stockholder, pick up the stock cheap, get control of this corporation, and I am going to get Mr. Rehrig the lease he wants at the rental he wants to pay and the location he wanted."

I was flabbergasted at this. I remonstrated with him. I tried to talk with him. I tried to point out to him the inconsistency of this kind of thinking.

I pointed out to him that he was a comparatively young lawyer. I said, "Where do you fit in, to sit on two sides of the fence at the same time? How can you come in here and tell me that this is what you are going to do for the purpose"—one minute he was talking representing him as a stockholder. The next minute he was talking about representing him as a tenant, and the end result was that he was going to go ahead and get for his client, wearing then the hat of a tenant, the best possible deal that he could get, and the devil take the debtor.

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[fol. 10133] The Witness: We then attempted to get together further on a negotiating basis with Mr. Robbins in so far as a lease for Mr. Rehrig was concerned, and there was an additional proposal, which had been advanced I believe by Mr. Philip to the effect that the $7200 that we had asked for would be acceptable, provided the debtor made certain repairs to the premises—I don't know, maybe four, five, six, $7000—the amount of which escapes me, and that the offer was also made that the debtor would not be required to extend its own funds for the purpose of making these repairs or alterations, but that they would be advanced by Rehrig, and that there would be a reduction over the period of the long term lease so that Mr. Rehrig's rent would be reduced, and in that way he would then get back the money that he had or would have expended for the alterations.

Well, now, this was refused, and it was around that time [fol. 10134] that I was present in Mr. Rosen's office when there was some conversation about this particular proposal.

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[fol. 10135] We then had another conversation, this time I would say in the spring of 1958, and it was along about the time that there was some hearings which concerned themselves with the stock claims that were going on.

Mr. Fried had reported to me that he felt that he could get $9000 or $10,000 for that space, that an offer had been made to him I think for $10,000, by his then landlord, who was a butcher. We had lunch one day during one of the recesses, and I think Mr. Robbins joined us.

The Court: What do you mean by his then landlord—where he resided?

The Witness: Yes. Mr. Robbins was invited to join us, and in the course of the conversation, we told him that we had this offer, that we were seriously considering it, that if Mr. Rehrig wanted to take it on that basis, why, we [fol. 10136] would be only too happy to talk with him about it, and he felt that Rehrig would not go for it, and that was that.

In the meantime, we are getting closer to the point where Mr. Rehrig's lease was coming to its expiration. We are now coming to along about May or June of 1958. At that point there was a conversation that I had with Mr. Fried, and I said, "Look, Jerry, we can't afford to gamble on this thing any longer. We have been playing with this thing a long time."

I said, "Please go out and scout around and dig up for me a tenant who will pay the highest price we can get for that space," which Mr. Fried did.

He ultimately came up with a tenant who was willing to pay $15,000 for that space. At about that time, Mr. Robbins, acting on behalf of Mr. Rehrig as a stockholder, called a meeting of all stockholders, an informal meeting, to discuss the general administration of this debtor, the matter of the lease, to be held at the Bar Association Building up here on 44th Street.

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[fol. 10138] He said, "And I am going to go ahead and blacken you so that you are going to back down, and you are going to give us the lease that we want."

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[fol. 10140] Now, at that point or shortly before that time, we had gotten an offer of $15,000 for the space that Mr. Rehrig occupied.

[fol. 10141] The Court: Plus the additional?

The Witness: I beg your pardon, yes, sir, plus the additional space on an as-is basis.

That was communicated to Mr. Robbins. He said that his man would never pay that kind of money, didn't believe we had the offer, and refused to pay it, and I said to him, "Look, it leaves us no alternative. This man has been there a long time. Nobody wants to boot him out of there, but as we have this offer of $15,000, which is so much more than your man is willing to pay, we are going to be bound to take it."

Ultimately, the matter of the $15,000 lease was submitted to this Court. Some security was insisted upon, both in connection with the terms of the lease, and after that I think the Court will recall that he gave the opportunity to Mr. Rehrig to match that lease, which Mr. Rehrig did at that point.

We signed the lease. That is the lease under which Mr. Rehrig is now in possession.

In general, what I have testified to respecting the lease this morning, the conversations that I had, the threats of exposure to tell the Judge about my conduct, to tell the Judge all about Mr. Fried's conduct, that represented sub-

[fol. 10142] stantially the background of any stock acquisition that I made myself. I knew that these people were out to get control. I knew that this was an adverse interest. My experience in negotiating a lease with these people indicated to me that they were not willing to pay the rentals which were being offered by other people, that they wanted special and preferential treatment, that there was a request made for a semi-monopoly of the sale of meats at the Market. I should say almost a complete monopoly in so far as the caliber and type of meat that Mr. Rehrig was accustomed to sell, as distinguished from the meat that the other butcher at the Market, Mr. Steever, had, who sells a different and better grade of meat.

To me, I felt that I was under an obligation to stop any kind of acquisition, of control by an adverse interest in

the form of this tenant. I did not at any time ever solicit any stock. I never approached anybody and said, "Let me have your stock."

It was only in situations where Mr. Rehrig, through his agents, was making attempts to purchase stock, that when stockholders came to me and told me about it, I told him to hold on to his stock, not to sell their stock, to stay right [fol. 10143] with the situation.

I was hoping that this thing would be getting out of reorganization. In some instances, the stockholders abided by my suggestion. In others, they didn't, and the proposition was put to me: Well, look here, the Rehrig people have made us an offer.

In the case of Dorothy Holober Clark, she said that she needed some money for the purpose of sending her youngster through college; this was her last year, she needed the money very badly; unless I did something about the situation, she was going to have to sell it to Mr. Robbins, representing Mr. Rehrig.

Well, I arranged on behalf of myself and Mr. Laupheimer, who is a co-director of mine, to purchase that one share of stock.

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The Witness: I should say this, at this point, that I felt my obligation to be at that point to do everything that was in my power to stop this butcher from in effect plucking [fol. 10144] this debtor. I didn't know anything at all about Section 249, with the prohibitions that it contained. The only thing I knew was that here I had somebody who was trying in effect to take over this corporation for his own private interests, and that this would be to the complete detriment and the damage of the debtor and its stockholders; that this man was an adverse interest in the sense that if he controlled this particular debtor, he would be in a position to deal with himself, and he could go ahead and, as the controller of this corporation, give himself the best deal possible.

I had in mind, to be sure, that there was a limit to which this man could go in so far as dealing with himself was concerned during the reorganization. I knew that this

Court would not ever stand for anything that smacked of that kind of skulduggery, but my thinking went beyond that. That was not the main proposition because we don't expect to stay in reorganization forever. There is going to come a time, I hope, that when we get out of reorganization, we can operate this business—

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[fol. 10145] The Witness: As I say, it was not only what Mr. Rehrig could or could not do within the framework of this reorganization proceeding, but I envisaged the future. If this man, as a consequence of his control of what-[fol. 10146] ever stock might possibly be validated by the Court in the future, this corporation and its stockholders could be a sitting duck, and there would be no Judge Sugarman to hold him in check.

There would be minority stockholders here, who would be in effect at the mercy of an adverse interest.

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[fol. 10160] Now, as far as the reduction in Mr. Fried's lease was concerned, this I felt was something that was in the ordinary operation of this debtor's business. This was not something that I had not done before with anybody else. There had been reductions made in other people's situations. For instance, there were many times when, because of a competitive situation or because of the impact that a strike might have on particular kinds of businesses, more especially hard goods as distinguished from food, which people require, that Mr. Fried would come over to me and say, "Here, what are we going to do about this poor guy here," referring to a tenant or a merchant.

"He is a good man; we would like to have the department here. What can we do?"

I said, "Look, Jerry, make the best deal you possibly can. Cut it a little bit. Maybe give him a concession here and there, but keep him in business" because in the cases of the tenants he had spoken of, I had seen these people operate, they were all right, and we certainly did not want a situation where we had empty spaces in that Market. We [fol. 10161] wanted it to be a one-stop shopping center

where people could come and get all of their wants, satisfy themselves, without going elsewhere.

I felt that if we are running the business, I certainly could do that. I certainly had in mind that we originally, under the order of Judge Holtzoff, were permitted to operate this business, and the only way I knew how to operate this business was to keep it rented under the best possible terms I could keep it rented.

I might also add, too, that we have waived benefits that we were entitled to under arrangements with various tenants. I should also say they did the same thing for Mr. Rehrig. There was no distinction as far as he was concerned. His present lease, for example, as a specific term, recited the fact that he was obliged, barring acts of God—and this is in a number of the leases that we have there—that he was obliged to keep his premises open on regular market days. The reason for that, if I may go into it for just a moment, is to insure that we have merchants operating there at all times so that any of our customers, when they do come there, are not going to be disappointed, that [fol. 10162] Mr. Joe Blow or Mr. John Smith are not open for the purpose of catering to their wants, and so that the general feeling might not be engendered that, well, we can't rely on Nazareth; half the time the merchants are not open and we might just as well go some place else, and there are plenty of places where they could go.

So his lease requires him to stay open, and lo and behold, this past year here, Mr. Rehrig closes up on a Friday and a Saturday. Now, I conceive that the debtor might have had some remedy in so far as that situation was concerned. Maybe damages, maybe something, I don't know, but, all right, maybe the man felt he had to be closed, maybe he had some particular personal reason. I certainly was not going to start a revolutionary war about the thing, let the thing go.

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[fol. 10163] I should say this, that in making this reduction from 15 per cent to 10 per cent under the terms that I have outlined here, I did not benefit by that one single, solitary cent. I didn't look for anything. I was not entitled

to anything, and I didn't get anything. This meant absolutely nothing to me except that it was in the line of the obligation that I undertook to run this debtor the best way I knew how, to protect it and to run it, so that ultimately the people who were going to own this debtor's business, are going to have something here—the only possible reason that I did it for, and the only reason.

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[fol. 10165] Cross examination.

By Mr. Robbins:

Q. Mr. Weinstein, if I understood you correctly, you say that the major problem Mr. Rehrig presents in his purchasing stock in the Market is that this might possibly put him in a position where he would be both landlord and tenant, and he would be dealing with himself in making a favorable or preferential lease to himself. Is that the idea?

A. My position is that, based upon his conduct, that he would give himself the better of any deal were he permitted to deal with himself.

Q. So it is this conflict of interest, in view of his past behavior, that you predicate as to what he would do that presents a conflict that you are trying to prevent. Is that right?

A. Yes, sure.

Q. What is the difference between Mr. Rehrig's future or hypothetical situation and Mr. Fried's actual situation now?

A. In what respect?

Q. Isn't Mr. Fried on both sides?

[fol. 10166] A. Mr. Fried has never sought a preferential lease. That is the difference.

Q. Let us start one step at a time. In fact, isn't Mr. Fried on both sides with an actual conflict of interest?

A. No.

Q. He is not?

A. No, sir.

Q. Secondly, you say Mr. Fried has not, in fact, sought any preferential treatment as a tenant?

A. Not when you are talking within the framework of comparing him with Rehrig.

Q. Let us put Rehrig aside for a moment. Has Mr. Fried sought any preferential treatment as a tenant, to your knowledge?

A. I would say no to that.

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[fol. 10171] A. Yes, the change took place this way. Mr. Fried was pointing out to me at that time that he, in conducting the races, was under no obligation to turn over any food percentage to the Market, but that he was doing it [fol. 10172] any way because the Market needed money.

Q. This is what Mr. Fried told you?

A. He not only told it to me; he did it.

Q. Then there came a time in 1954 and 1955 when Mr. Fried told you that henceforth, he would collect La Grotte's rents on these Sunday sales?

A. Mr. Fried told me he could no longer operate these races under those circumstances, and that he was going to go ahead and keep the food concession percentage or money in those situations where he paid 15 per cent.

The Court: This change or the relinquishment by Mr. Fried of the voluntary payments, was it coincidental with the arrangement that he pay 10 per cent and increase the purses?

The Witness: Oh, no.

The Court: That was long before?

The Witness: That was long before, your Honor.

The Court: All right, go ahead.

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[fol. 10173] The Court: Mr. Robbins, I fail to understand the thrust or significance of your questions.

If the Nazareth Enterprises lease provided that if Nazareth Enterprises paid 15 per cent of its take, it was entitled to any emoluments arising out of the sale of foods in the Market on race days, and despite the fact that it might have voluntarily not taken those emoluments, despite

the fact that it paid the 15 per cent and then subsequently decided that it no longer wanted to make that gratuity to the debtor, but that it would pay it 15 per cent and take [fol. 10174] emoluments from the sale of food, why would it have been necessary, if that was the provision in the lease between the debtor and Nazareth Enterprises, for the Court to be informed about that?

I am serious about the theory on which you are predicating these questions, unless I misunderstand the agreement.

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[fol. 10194] Q. Do you remember any discussion with Mr. Rosen about that change in paragraph 3 of Debtor's Exhibit AI in the Jerome Fried creditors claim?

A. I remember that there was a discussion by Mr. Fried, and I should also point out that there were a number of discussions about this prior to the actual typing up of this document, and that there were discussions even after the document was completed.

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[fol. 10195] Q. Do you know whether Mr. Rosen asked for an explanation of the difference in definition?

A. I don't recall anything like that at all.

Q. And you did not ask for advice about this?

A. I wouldn't say that either. The fact of the matter is that I am not at all certain that this was even the final agreement that we were supposed to submit because, as I remember it now, Mr. Rosen was holding that thing I think on a promise to Mr. Fried to hold it in escrow because he [fol. 10196] wasn't so sure Mr. Fried, despite the fact that he signed it, that he wanted to go through on that kind of a change.

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[fol. 10204] Q. Mr. Weinstein, did Mr. Rehrig ever ask [fol. 10205] you for an exclusive on the sale of fresh meats at the Market exclusive together with Mr. Steever?

A. He never asked me.

Q. Were you ever informed by Mr. Fried that he asked Mr. Fried for an exclusive?

A. Yes.

Q. Do you remember your ever having given any reasons for denying an exclusive to Mr. Rehrig and Mr. Steever?

A. I don't recall having given any reasons. I did have reasons.

Q. Would you care to tell what those reasons are?

A. Yes. The policy of the Market, as we have set it out, is to try to insure prices as low as possible, to insure that we would attract the business of all the people in the surrounding area. It is my feeling that were we to give to one particular individual a monopoly, more especially with respect to meat which, as I have observed, is probably one of the most active kinds of businesses in a Farmers Market, to give such a monopoly, you are defeating your purpose with respect to maintaining a lower level of price.

Where you have competition, two things come into op- [fol. 10206] eration: To begin with, competition, in and of itself, is a healthy thing. I don't wish to go into the economic theory behind that. But, in the second place, where you have competition, you do have a striving on the part of the competitors to render better service at the lowest possible prices so that they would be in a better position to compete with each other and attract the customer for goods.

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[fol. 10268] Redirect examination.

By Mr. Weinstein:

The Witness: The date was suggested to me of May 7, 1957, at which time I superintended a transaction in connection with the acquisition of some shares of stock in Nazareth on behalf of my sister, Blanche Waldman. I wish to state that at that time and prior to that time, I had received information with respect to the fact that there was an attempt being made to purchase stock on the part of Rehrig.

The Court: Hasn't that all been put in the record in connection with your sister's claim?

The Witness: I don't believe so.

The Court: All right, go ahead.

The Witness: That while I had information from Mr. Masur, Mr. Buckwald, a lawyer, to the effect that a so-called Philadelphia group was trying to buy control of this Market or pick up some of its stock, I am reminded that I did receive a telephone call from one of the stockholders or alleged stockholders or creditors in this proceeding by the name of Morton Samut to the effect that he had been advised by one Richard Hull that he was buying stock, he meaning Richard Hull, or attempting to buy stock on behalf of a butcher out in Nazareth.

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[fol. 10315] Direct examination of
Jerome Fried.

By Mr. Weinstein:

Q. Now, let me go, Mr. Fried, to the transaction in which I acted as your agent in the acquisition of shares of stock or alleged shares of stock in this corporation which were then held by Dorothy Clark, her husband Barry Clark, and Lazar Karapontso.

A. Yes.

Q. You bought that stock, did you?

A. Yes, sir.

[fol. 10316] Q. How much did you pay all told for that stock?

A. For the group?

Q. Yes.

A. $8000.

Q. And where did you get the money?

A. Some of it I had, and I borrowed approximately $4500 or $5000.

Q. From whom did you borrow it?

A. Friends of mine.

Q. Can you name them?

A. Yes.

Q. Would you please do so?

A. Dr. Thompson, Dr. Frank Thompson.

Q. Anybody else?

A. Fred Tedesco.

Q. Yes.

A. Pat Ronco, and some from the Second National Bank.

Q. That would be the Second National Bank in Nazareth?

A. In Nazareth, yes.

Q. Now, then, at the time that you made your purchase did you know that Mr. Wilson Rehrig through his agents, or his attorneys, or his employees, were attempting to [fol. 10317] purchase that stock?

A. Yes, indeed.

Q. Was that the reason why you went out and you borrowed money for the purpose of purchasing that stock?

A. That was the only reason.

Q. Did you solicit the purchase of that stock?

A. On the contrary.

Q. What do you mean by "On the contrary"?

A. I tried to tell these people, as I recall, not to sell their stock at all, not to us and not to the other people.

First of all I did not feel like I wanted to buy it because I did not have the money to put up and it meant going into debt for it, and I just felt, because we discussed it with them more than one time, too, and we thought that perhaps maybe they would not sell at one point, but they decided that they needed the money and they sold, and this was only due to the—well, I think that there was an agreement that we had agreed to, the first refusal agreement, and there were two or three people in it.

Q. Were you told in connection with that purchase by the seller that if you did not buy it, or anybody connected with management, that they were going to sell it to Mr. [fol. 10318] Rehrig?

A. Absolutely, they told us that.

Q. They told you that they had received offers for your stock from Mr. Rehrig?

A. Yes.

Q. Through his agents or his lawyers?

A. That is correct.

Q. Well, how much do you recall them having told you that they had been offered by Mr. Rehrig through his lawyers for the sale of that stock?

A. As I recall, I think they offered him a thousand dollars a share.

Q. And that was the price—

A. And, as I recall it, we had to meet their price.
Q. And that was the price that you paid?
A. That is right.

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[fol. 10320] Q. Now I also show you, Mr. Fried, three photographs, and I ask you whether or not these represent fairly and correctly pictures of the stores or institutions which are in competition with the Farmers Market in Nazareth, Pennsylvania, at the present time?
A. These are just a few of them, but these are correct.

Mr. Weinstein: I offer these photographs in evidence.
[fol. 10321] Mr. Robbins: May I inquire of the witness as to these, your Honor, for a moment or two?
The Court: Surely.

Preliminary cross examination.

By Mr. Robbins:

Q. Mr. Fried, I refer to the photograph of the Acme Market.
A. Yes.
Q. Where is that located?
A. Directly opposite the Nazareth Fair Grounds.
Q. And with respect to the photograph, Two Guys from Harrison, where is that located?
A. What do you mean, just in mileage, do you mean?
Q. Both.
A. Well, it is—I don't know exactly. It is the Township of—
Q. Well, is it just outside of Allentown?
A. Yes, it is outside of Allentown.
Q. And how many miles from the Nazareth Market would you say?
A. Maybe about seven or eight miles.
Q. And what about this one here, the Woolworth store?
A. That is in the shopping center.
[fol. 10322] Q. Where is that located?
A. Less than five miles, roughly.
Q. Where?
A. In Easton, Palmer Township.

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[fol. 10370] Cross examination.

By Mr. Robbins:

Q. Did the debtor reduce any rents?
A. Yes.

The Court: Just a minute.
Mr. Robbins: Excuse me.
The Court: Has the rent of any tenant been reduced during the past two years?
The Witness: Yes, sir.
The Court: Whose rent?
The Witness: I think in the last two years in the case of—
[fol. 10371] The Court: Whose?
The Witness: We had—I believe we had four produce departments in particular that I can think of right now where we reduced the rent.
The Court: What were the names of the tenants?
The Witness: Joseph Wanko, Sam Margolis, Charles Klein and David Katz.
The Court: Now, within the past two years or thereabouts, has the rent of any or all of those four been reduced?
The Witness: All four.
The Court: Now, has the rent of any other tenant other than those four been reduced during this period, in the last two years approximately?
The Witness: Well, first, may I say that in the case in which the rents were reduced we had first increased it and then—
The Court: I didn't ask you anything about that.
The Witness: I am sorry.
The Court: We will come to that. I want to know if the rent of any tenant other than the four you have men-
[fol. 10372] tioned has been reduced in approximately the last two years so far as you can remember?
The Witness: I can't recall.
The Court: All right. Now, what were the circumstances under which the rent was reduced as to each of the four whom you have named?
The Witness: Well—

The Court: Take them one at a time unless it was done jointly.

The Witness: I think it was a joint thing, your Honor.

The Court: All right. Give us the background, the circumstances, just what happened that brought about the reduction.

The Witness: At one time before the reduction we were charging the produce departments I think it was $6 a front foot and—

The Court: Incidentally, Mr. Fried, did any of these people, or all of them, have written leases?

The Witness: No, sir, not at that time.

The Court: What arrangement did you have with respect to each of them?

The Witness: No particular—no arrangement, except that they paid their rent monthly, and that was it.

[fol. 10373] The Court: Well, they were payments from month to month?

The Witness: Yes, sir.

The Court: They were not like the tenants who came in overnight?

The Witness: No, nothing like that.

The Court: That Mr. Weinstein spoke about.

The Witness: No, sir. These people had been with us for several years.

The Court: All right. Then take it from there.

The Witness: Yes.

At one point we charged $6 per front foot, and then we raised the rent to $7 a front foot.

The Court: $6 a front foot to $7 a front foot for what period?

The Witness: Every month.

The Court: In other words, if a man had 70 feet he would have been paying $120 and then later on $140?

The Witness: Right.

The Court: All right.

The Witness: Then we raised it again, another $1 per [fol. 10374] front foot which brought it up to $8 per front foot and that I think was in July of about 1958. I believe that is what it was, of July, 1958.

The Court: Yes.

The Witness: We raised the rent to $8 a front foot.

We rented during the month of July when business was very good, and then in August it looked like the bottom just fell out of everything for produce men particularly simply because in our particular area there is a lot of home grown items and we have—we only have one merchant who sells his home—who sells his own home things in the Market, but all of those stands were open and the farmers were selling things. They had a bumper crop that year and we just could not compete with them as far as the ones who must buy their produce at the Philadelphia ports and so on and bring them up to Nazareth.

So at that point the merchants, and I mean all four of these merchants, brought it to my attention, that their rent at that point was greater than ever expected or could afford to pay for it.

Well, I didn't do anything about it at that point. I felt [fol. 10375] that this might be a temporary thing.

And also I told them that there were months that they do quite well and when they didn't give me an increase, but considering now that their business was bad, why I should decrease it at that particular time?

Then we went through the thing without change until the end of December, and after the holidays at that year, at which point if I recall correctly we had another very bad time in their particular line of business and they approached me again, telling me that they had the two increases, and they said, "Why not give us a break for a couple of months in the winter," whereby they could have some semblance of a break on the rent.

Incidentally, your Honor, these people occupied frontage of no less than about 40 feet and they had a very perishable item, and as an example of it, with the produce tenants that is quite an item in the Market.

For example, if they were to bring up, say, 30 boxes of bananas which represents about 1200 pounds, and if they lost half of that load of bananas on a Saturday because they didn't sell them, they can't eat all of those bananas come [fol. 10376] Wednesday, and that is what they had or what they were up against, and this was quite a loss.

And then there was the situation where I was being besieged more or less, and where they were clamoring for other items which could be used as sale items, the expenditure of sums for advertising matters and the like being considered, because after all we did have the kind of Market that brings in people off the beaten path.

Then, of course, there arose another complaint, with the same kind of rent, they would say, with the same kind of rent we are paying to you, how can we afford to give the meat item at cost or less than cost?

But my argument was that if we could have a losing item with meat, that could very well be made up on the difference with the other items that they had on the stand.

Well, this policy I followed, but then later on we reduced the rent to $7 a foot, but at the same time they had to promise that they would give me these items that I was asking for.

The Court: And has it remained at $7 a foot since then? [fol. 10377] The Witness: No, because quite a change has come about since then, quite a change, your Honor.

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[fol. 10394] The Witness: Some time in August of 1957 I received a phone call from an alleged stockholder whose name is Eskander Manoochehrian, and he called me on other occasions because he happened to be the brother of my brother-in-law, and I thought that this was just one of those social calls until he said to me that he had a phone call from Mr. Melvin Robbins, and that Mr. Melvin Robbins was trying to buy his stock.

And I pleaded with him until December of that year not to sell it at all.

And the only reason that I purchased his stock at that time was so that these people who were trying to, as far as I was concerned, beat the corporation where they could to benefit their own particular case, I just felt that was a thing I had to do, your Honor, and I never dreamed that I was a fiduciary and it was not a proper thing for me to do.

The only reason I did not want to do it before was I did not have the money to do it.

So I started pleading with my brother-in-law not to do it, and then I had to borrow money at that time so I could purchase the stock and in that way prevent them from getting it.

[fol. 10395] And as far as my own opinion was concerned, and because of my conversations with them, I felt that they had only one motive in mind, and that was to get what they were looking for for their particular tenants or clients and the heck with everybody else.

I even felt that then at that time that they would throw merchants out of the Market who were selling products that might be sold by their people, even though the people in the Market might not be on written lease but oral lease, such as some of the tenants are. And it does seem a very unfair thing for them to try to bring about that condition, and I bought the stock to stop that kind of movement.

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[fol. 10462] Cross examination of James La Grotte.

By Mr. Fried:

Q. Mr. La Grotte, in early 1952 do you recall there was —and this is before I took the races over in August, 1952, you understand—

[fol. 10463] A. Yes—

Q. There was another promoter who had run the races there, is that right?

A. Yes.

Q. Do you remember his name?

A. Oh, I don't remember.

Q. See if I can try to help you with the name.

A. No, I can't remember his name.

Q. Do you remember a man by the name of Garry Gordon?

A. That is right, Garry Gordon.

Q. When Garry Gordon was running the races at the Nazareth Fair Grounds did you run the food concession on Sundays?

A. Yes, sir.

Q. And to whom did you pay the rent?

A. Garry Gordon.

Q. You did pay it only to Garry Gordon, is that right?

A. Yes.

Q. And when Garry Gordon left and we took over the races, Jerome Fried, myself and this other party, what is it I told you to do or to pay about the rent at that point?

[fol. 10464] A. You told me to pay the Nazareth Farmers Market.

Q. And did I tell you to do that?

A. Well, you explained to me that the Market needed the money.

Q. Yes.

A. And you told me to pay the rent to the Nazareth Farmers Market which I agreed to. I didn't have no objection to who I did pay the rent to.

Q. That is, I said to you that the Market needed the money?

A. That is right.

Q. And I told you to pay the rent to them?

A. That is right.

Q. Instead of to me?

A. That is right.

Q. Is that correct?

A. That is correct.

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[fol. 10482] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Bankruptcy 89669

In the Matter

of

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

Transcript of Hearing—June 14, 1960

New York, June 14, 1960,
10:30 A.M.

Before:

HON. SIDNEY SUGARMAN,
District Judge.

APPEARANCES:

Rosen & Rosen, Esqs., Attorneys for Debtor; Alex L. Rosen, Esq., of Counsel.

Charles Seligson, Esq., Examiner.

Melvin Lloyd Robbins, Esq., Attorney for Robert H. Davidson, Frederick Katzenell, Irving J. Wolf, Richard Hull, Ernest Pollak, Dorothy Kane, Ann Rosen and Wilson Rehrig.

Benjamin Margolis, Esq., Attorney for Benjamin Margolis, Ida May Margolis, Sarah Kason and Bernard L. Unger.

Jerome Fried, Esq., pro se and Aaron Fried.

Arnold A. Weinstein, pro se.

[fol. 10483]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: We will first address our attention to the application by Mr. Weinstein.

By order to show cause dated June 9, 1960, Arnold A. Weinstein moves for an order "Reopening the hearing heretofore had on the petition of Irving J. Wolf, verified March 13, 1959, for termination and recoupment of compensation (pursuant to Section 249 of the Bankruptcy Act) in respect of that branch of said petition dealing with termination of compensation payable to respondent Arnold A. Weinstein, so as to permit said respondent to offer and submit proof and testimony relating to and in support of the defenses interposed in his answer to the said petition, . . ."

For purposes of this motion, the Court will assume that the Weinstein stock purchase was made in good faith as he contends, i.e., under compulsion and in furtherance of what movant conceived to be the debtor's best interests. Nevertheless, the purchase of stock of a debtor by a fiduciary is absolutely prohibited.

Judge Dimock's language—footnote 1: In re Third Avenue Transit Corporation, 159 Fed. Supp. 440, 443-444 (SD NY 1958), affirmed sub. nom. Surface Transit, Inc., v. Saxe, Bacon & O'Shea, 266 Fed. 2d 862 (Second Circuit 1959)—[fol. 10484] in denying compensation to a fiduciary who was forced to sell bonds of a corporation in reorganization is especially apt here:

> "This result is nothing short of tragic . . . I am convinced that such was the claimant's interest in his work for his clients, as distinguished from his interest in his own compensation, that he was completely oblivious to the provisions of Section 249 at the time that he sold the bonds . . .
>
> "Nevertheless Congress, in its wisdom, has tied the hands of the courts. So strong is the public policy against dealings by persons engaged in the reorganization of a corporation in the securities of that corporation that the courts are not allowed to remunerate from the estate one of them who buys or sells any of those securities. No amount of benefit conferred upon the estate by a claimant can be permitted to make up for a single harmless false step taken innocently in a time of stress."

Now I realize that Judge Dimock was dealing with a strict Section 249 proceeding. I realize further that in reversing the referee here I held that strict construction of Section 249 was not to be applied, that it was the spirit [fol. 10485] rather than the letter of the section that applied, and that what was intended by Section 249 applied here even though the compensation might be different between that of an allowance subsequently made and that of compensation as an employee or officer of a corporation previously made. However, in any event, on the basis of the holdings cited, Mr. Weinstein's motion to adduce additional proof to try and justify what he did is denied.

Mr. Weinstein: If your Honor please, not in further argument in respect of that branch of the application, I realize that I am imposing on the Court in attempting at this time to amend the application upon which your Honor just ruled. I can only say that the thought came to me very, very recently. As a matter of fact, it was over the week-end. I am going to ask your Honor to permit me to amend the answer which I had interposed in connection with the application for termination and recoupment, also as far as the application for removal was concerned, on this ground: that the petitioner, Mr. Wolf, has waived his rights to proceed under Section 249 in this respect. As your Honor knows, an application is presently pending before your Honor—

[fol. 10486] The Court: Let me interrupt you. Where is the application under 249 for removal?

Mr. Weinstein: The application is not under 249 for removal.

The Court: Let us not confuse a bad record any more than we have to. I am dealing now with an application for termination of compensation and recoupment of compensation brought on by a verified petition dated March 13, 1959.

Mr. Weinstein: Yes, sir.

In that respect I suggested to your Honor a waiver on the part of Mr. Wolf, the petitioner here, in this respect: As your Honor well knows, an application has been pending before your Honor for the approval of an election which was held on August 1, 1958.

The Court: And that is one of the items that is before me this morning.

Mr. Weinstein: That is quite so. I am not, however, directing my remarks to the decision on that particular application except that I am bringing it to your Honor's attention. At that election which was held on August 1, 1958, Mr. Wolf, the petitioner here, voted in favor of my election as an officer and director of this corporation.

[fol. 10487] The Court: That has nothing to do with the application before us. Nobody is removing you as president. I have held that under the spirit of Section 249 that you are to receive no compensation.

Mr. Weinstein: I am directing my remarks, your Honor, specifically to that.

The Court: You are saying because he voted for you to be a president of the corporation or a director, and the directors in turn elected you president—in the first place, Mr. Wolf was not a director, was he?

Mr. Weinstein: No, sir, he was not.

The Court: The officers are elected by the directors, not by the stockholders.

Mr. Weinstein: That is quite true.

The Court: He voted for you as a director apparently.

Mr. Weinstein: Yes, sir.

The Court: He did not vote for you as president.

Mr. Weinstein: No.

The Court: I understand the thrust of your argument is by having voted for you as a director of the corporation he waived by some legal legerdemain that I do not under-

[fol. 10488] stand his right to bring on an application to end your compensation.

Mr. Weinstein: If your Honor permits me two more minutes, I will be able to explain it.

The Court: I won't allow you two more minutes because I think you are wasting my time. I made it clear that no matter how good your intentions were in the purchase of that stock that you violated the spirit of Section 249 and whole spirit of the Chapter X proscription against fiduciaries dealing in the stock of a debtor of which they are fiduciaries.

Mr. Weinstein: I appreciate your Honor's position. I merely wanted to say that the election at that time was

unanimous and the vote was taken and had at a time when knowledge was had by all of the parties with respect to the previous purchase of stock, and knowledge was also had—

The Court: I will assume that, Mr. Weinstein, and it does not alter my opinion about it. Nevertheless, I will deny your application. I will assume what you say to be so, that when they voted for you as a director and when the directors elected you president that they had full knowledge of your dealing in the stock. Whether they knew at that time that [fol. 10489] that would constitute a violation of the spirit of Chapter X I think is unimportant.

Once it was brought to the Court's attention, the Court had every right to act. Now the Court did act to the extent of directing that your compensation cease, but delayed the entry of an order, and the reason for that delay will be touched upon when I get to the remaining application for an order in the four pending matters still open before the Court.

Mr. Weinstein: Yes, sir.

The Court: By order dated May 31, 1960, the Court directed that Nazareth Fair Grounds & Farmers Market, Inc., the debtor, Arnold A. Weinstein, H. Lawrence Laupheimer and Jerome Fried show cause today, the 14th day of June, 1960, why the Court "Should not make a direct entry of an entry or orders, forthwith, granting the following petitions now pending before this Court, namely: (a) Petition, verified March 13, 1959, for termination and recoupment of compensation (pursuant to Section 249 of the Bankruptcy Act); (b) Petition, verified January 5, 1960, for removal of president, secretary-treasurer and general manager of debtor for misconduct in office, and for termination and recoupment of compensation; (c) Petition, verified [fol. 10490] January 6, 1960, for cancellation or rejection of (Enterprises) lease and for accounting by lessee; (d) Petition, verified August 6, 1958, for approval of proposed directors and officers of debtor (pursuant to Section 191 of the Bankruptcy Act); . . ."

Preliminarily, the record should reflect that earlier disposition of the matters was deferred by the Court in the

expectation that the decision of the issues of law and fact raised in the trial of the claims of putative holders of shares of stock of the debtor would dispose of certain branches of the petitions previously mentioned.

However, the pressure of other court business and the time required to be spent reviewing the thousands of pages of testimony and the hundreds of exhibits received on the trial of the stock claims will preclude decision of those claims for several months.

The nature of the matters before the Court anew today, dealing with debtor's management, should not be left undecided any longer.

The petitioner was directed to submit an order to show cause so that the parties might be given notice of the Court's intention to take appropriate action on the petitions at this time.

[fol. 10491] Accordingly, unless any respondent desires to be heard, the Court will now rule on the instant motion brought on by order to show cause. The Court does not invite reargument of the petitions. It does not ask for new evidence. It simply asks for legal cause why the matters should not now be ruled on.

Does any respondent wish to be heard?

Mr. Fried: Your Honor, I realize that when you ruled for termination of my pay on January 4th—I believe that was the date—that at that point I had no opportunity to explain to the Court what my job was, so perhaps I could not be classified as a fiduciary if the Court knew. At this point I still have not had that type of opportunity.

The Court: Do you wish to take the stand and offer proof?

Mr. Fried: Yes.

The Court: Go ahead.

[fol. 10492] JEROME FRIED, called as a witness, having been first duly sworn by the Clerk of the court, testified as follows:

Direct examination.

By Mr. Fried:

The Witness: I would like to explain to the Court my job for which I am paid a weekly salary at the Nazareth Fair Grounds & Farmers Market.

In explaining my work at the Market I would like first to say that one of the biggest parts of the work involved is that of the promotion for the general merchants at the Nazareth Farmers Market, for which the Market is greatly responsible both for the making up of the advertising and the production of the entire advertising campaign and over the years this job has become primary.

In the past, aside from advertising, there has been a matter of collection of rents. Before and even during the proceedings of this Chapter X we used to hire a man who would collect rents from those tenants who did not send their checks in through the mail or deliver them to the office. His name was Maynard Huber.

We reached a point at the Market where money was quite tight and so it seemed more feasible in order to save some [fol. 10493] money that I begin to collect rents which had to be collected by someone, and we saved the pay that this Maynard Huber was then getting. At no time since I have been working for the Market have I done just anything that is strictly on my own in the form of what might be considered a fiduciary. I have always conferred with the president of the corporation in matters of leases with tenants, which is our big business, that is what we do, we rent space, and in every case Mr. Weinstein has been first asked whether or not these particular deals with tenants were proper.

The Court: Mr. Fried, how often is Mr. Weinstein at the Market?

The Witness: At least once a week.

The Court: In the interim, when he is not at the Market,

who operates the business and manages the property of the debtor?

The Witness: I do, sir.

The Court: Go ahead.

The Witness: In the interim I would also like to add if we were to check our phone bills between Nazareth and New York, Mr. Weinstein's office, it would be obvious I talk a great deal with Mr. Weinstein on the phone other than his visits to the Market. In some instances, even my [fol. 10494] own suggestions were not acceptable to Mr. Weinstein, and so they did not occur.

By and large, I might add, your Honor, that this is just my own opinion, that I do not know whether the intent of Congress in drawing Section 249 was to penalize a man working for a firm not in any official capacity such as an officer or director who makes policy, and certainly I have never had any position where I had any particular or any more knowledge than anyone else in the entire corporation and in our entire area where the stock claims were public record. I had no particular knowledge as to whose stock might or might not be good and I am sure nobody has had that knowledge.

The Court: Mr. Fried, notwithstanding your protestations that you were a mere employee, who was it that arranged for the paving contract?

The Witness: I arranged for it.

The Court: Who arranged for the carting loan?

The Witness: May I go back to the paving job?

The Court: Yes.

The Witness: Firstly, we got figures from various people.

The Court: Who is "we"?

The Witness: I got the figures. Somebody had to do it. [fol. 10495] The Court: That is precisely the point.

The Witness: And these figures were submitted.

The Court: To whom?

The Witness: To Mr. Weinstein, who submitted them to Professor Seligson, who signed the order, who approved the paving job. I cannot see where I had anything to do with the approval of the paving job. Then the Court finally did not approve it anyway. But we had gone ahead

with the job on the basis that Professor Seligson said it was all right to do it at the time, so I did not do the job myself.

On none of these things, your Honor, in the question of building the building, and so on, it was always a matter of somebody had to get the figures together and it happened to be that I was there, and I don't think I should be punished as a fiduciary.

The Court: You are not being punished.

The Witness: If my pay is stopped, I would be. I feel, in any event, inasmuch as I had previously owned stock in this corporation as a stockholder, before I ever made any purchases, the only difference that I could see in the fact that I purchased the stock was the fact that the stock was [fol. 10496] transferred from one person to another. It did not give me anything additional. For example, your Honor—

The Court: I am not going to hear any argument on that. You are in the same boat as Mr. Weinstein on that, no matter how good your intentions were for the benefit of the debtor, this purchase may have in your mind been proper, and I don't challenge that at all, you are in the same position as Mr. Weinstein.

The law forbids it, you should not have done it and you cannot get compensation if you did.

The Witness: What I am saying—

The Court: The only difference between you and Mr. Weinstein is that you claim you were a mere menial employee and not a fiduciary, but from my knowledge of this proceeding over the past number of years, my visit to the Market, and so on, you were substantially more than a mere employee. You were no cop in the parking lot. You ran the business while Mr. Weinstein wasn't there. As you admitted, you operated the business and managed the property of the debtor. The fact that you consulted and got approval from the directors does not diminish your status in the structure of the debtor. You were the managing agent.

The Witness: I only wish I had known that before.

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[fol. 10497] Cross examination.

By Mr. Rosen:

Q. Mr. Fried, were you authorized to sign checks?

A. No, sir.

Q. Were you authorized to sign contracts?

A. No, sir.

Q. Were you authorized to sign anything tying the debtor in any manner?

A. No, sir.

Q. The debtor operates a market?

A. Right.

Q. Where it does leasing?

A. Correct.

Q. Let me see if I can define your duties in the market and if I am incorrect kindly correct me. In the operations of this debtor in leasing the market, if somebody comes to the market and wants space, you talk to him?

[fol. 10498] A. Right.

Q. Beyond that, anything you take up as far as signing the lease or confirming anything you have to take that up with Mr. Weinstein?

A. I try to work out the rental as we know it should be in the Market, that is, the price that we have generally. Then I submit the figures to Mr. Weinstein and I ask him does he think this will work out for this particular tenant, because the figures vary.

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[fol. 10500] Q. Might I ask kindly whether your duties were discussing complaints with tenants, collecting the rent, [fol. 10501] discussing the leasing with them, seeing that the employees attended to their job, and beyond that, where any discretion was to be used or any documents were to be signed on behalf of the debtor, contracts, leases, et cetera, you would have to go to the office of Mr. Weinstein?

A. That's correct.

• • • • • • •

[fol. 10502] The Witness: Your Honor, I brought up the matter of advertising especially, because that certainly does

not come under any category of a fiduciary. Formulating advertising matter and the promotion, on every Market day we have it is a matter of discussing prices and items with I wouldn't say many, but with 20 or so different merchants who have different ideas. That takes a great deal of work, jelling that, and I don't see that that makes me a fiduciary.

• • • • • • •

[fol. 10511] Cross examination.

By Mr. Weinstein:

Q. As part of your duties, it is your job to see that the Market is clean and the aisles are swept, garbage removed and matters of that nature, is that correct?

A. I don't do it myself, but I see to it that it gets done.

Q. It is your job to superintendent the people who clean and keep the place in clean condition?

A. Yes, and see that they have the materials to do it with.

Q. That encompasses the ordering of cleaning supplies, brooms and sweepers?

A. Everything that we need for cleaning.

• • • • • • •

[fol. 10519] Cross examination.

By Mr. Seligson:

Q. Did you at any time tell Mr. Weinstein you thought you should get more money because of the services you were rendering?

A. Yes.

Q. When the petition was filed, you first got $100 a week?

[fol. 10520] A. I guess it was that amount.

Q. You were then designated as general manager?

A. Somebody designated me as general manager.

Q. You knew you were?

A. I knew I was working.

Q. Did you know that you had been designated as general manager?

A. I don't think I knew anything that I was being called.

Q. You are on the witness stand. Did you or did you not know?

A. My best recollection is that I was always general manager of the Market.

Q. Did you know that the order of this court provided for your continuance as general manager of the debtor?

A. I wouldn't be on the job if I weren't continued.

Q. Did you know the order so provided?

A. I don't remember seeing the order at that time. I was told I was going to stay on the job.

Q. Were you told that you were the general manager of the business and would run it?

[fol. 10521] A. Nobody ever said anything like that to me.

Q. Did you ever see the order?

A. Not during those days. I have seen it since.

Q. When did you first see it?

A. I don't remember that.

• • • • • • •

Q. Thereafter you went or did you go to Mr. Weinstein and tell him that you thought your salary ought to be increased?

A. Sometimes after that, yes.

Q. Did you tell him that you thought your salary ought to be increased because of the increased responsibility that had been given to you?

A. No, I don't think that at all.

Q. What did you tell him?

A. I told him I was working too hard for the money I was getting.

Q. And he agreed to an increase and he applied to the court for an increase to $150 a week?

A. As I recall, Professor, it did not work out quite like that.

[fol. 10522] Q. How did it work out?

A. I was asked to cut my salary back when they filed the proceedings. I was told at the time it would not take

more than 90 days. For 90 days I did not feel I would argue for a difference of a hundred dollars.

• • • • • • •

Q. Did you thereafter ask Mr. Weinstein to get your salary increased to $200 a week?

A. I certainly did.

[fol. 10523] Q. What did you tell him?

A. I told him I was to have more pay for the work I was doing, the work was mounting up, getting rough.

Q. He then went to the Court and he got an order on January 13, 1956, increasing your salary to $200 per week?

A. Yes.

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Q. Did you ever sign any checks for the debtor?

A. I can't.

Q. Did you ever?

A. No.

• • • • • • •

[fol. 10525] Q. But subsequent to the Chapter X you were not a director and officer?

A. No, sir.

• • • • • • •

RULINGS BY THE COURT AND COLLOQUY THEREON:

The Court: I am considering the testimony of Mr. Fried as an application for reconsideration, as I did the application of Mr. Weinstein, of my memorandum of January 4, 1960, where in the third paragraph I said, "The records thus far establishes that Weinstein and Fried are such salaried employees who are fiduciaries and have traded in the debtor's stock."

Now, while Mr. Weinstein's application for reconsideration dealt with the justification for trading in the debtor's stock, Mr. Fried's application I would assume deals not only [fol. 10526] with that but also with the determination that he was a fiduciary.

Nothwithstanding this additional proof, I am disposed to deny any reconsideration and adhere to the decision of January 4th.

There is no problem, I might observe parenthetically, as to the timeliness of these applications, because the memorandum is not the Court's final order. So both applications in my view are within the time.

However, on the merits, the decision of January 4, 1960, is adhered to.

Keeping in mind that the present blanket application, so to speak, seeks orders in four separate pending matters, and I review them again, the first for a termination and recoupment of compensation pursuant to Section 249, the second for the removal of the officers and for termination and recoupment of compensation, the third for the cancellation or rejection of the lease to Enterprises and an accounting by the lessee, and the fourth for the approval of the election of directors and officers. Omitting for the moment the third, which deals with the cancellation and rejection of the Enterprises lease and concerning ourselves only with the first, second and fourth, does anyone wish to state [fol. 10527] any legal cause why those matters should not now be ruled upon?

• • • • • • •

[fol. 10529] The Court: I am acquainted with the fact that the debtor has made money, but my feeling is that these people dealt with the stock, technical or otherwise, and I share Judge Dimock's regret at the result. However, Congress has made a pronouncement, and it has to be adhered to. In the light of the fact that I cannot dispose of these stock claims in the Margolis review, I intend to spend the entire summer on it. I have already spent some time when not engaged in other matters, nights and weekends, reading the 200-odd page recommendation of the examiner, but I am not content to rely, notwithstanding my great respect and admiration for Professor Seligson, I am not content to rely on his appraisal in and of itself. I have got to review the entire record myself.

I cannot permit the condition to persist where I have said that these men have violated the spirit of Chapter X and yet permitted them to draw compensation and operate and manage the debtor's affairs.

Mr. Rosen: It is seven years. Would 90 days make much difference? If your Honor feels there is bad faith, or if

[fol. 10530] your Honor feels there has been some immorality, then that is different.

The Court: Bad faith and immorality do not enter into it, Mr. Rosen.

Mr. Rosen: Then I say if that is the situation, isn't the most important thing for the creditors, for the stockholders, for everybody concerned the best interest of the debtor?

The Court: From your point of view it may be. But from my point of view the important thing is what has Congress said, and I have ignored that ever since January in the hope that this matter could be resolved within 60 or 90 days. Now I realize it cannot be. I am not disposed to flout a congressional fiat any longer.

Mr. Rosen: Who would benefit by this? I think the most important thing is the debtor itself, the harm and the prejudice to the debtor. Congress also has said that your Honor should protect the interests of the stockholders and the interests of the creditors and to conserve the assets of this estate so there should be no harm done. That is another mandate from the Congress.

The Court: That's right, but Congress has categorically stated that those who are fiduciaries should not trade in [fol. 10531] the stock. It made the act the test, not good faith.

Mr. Rosen: But you have a right to weigh both things on a scale, the interest of the debtor and the interest of the creditors and the other. Can't your Honor use your equity powers at the moment and hold this thing until we really get to the merits?

The Court: I feel that I have it long enough.

Addressing yourselves anew to the three phases of this motion, exclusive of the one dealing with the Enterprises lease, does anyone else wish to be heard?

Mr. Rosen: Might I ask one thing, your Honor. There has been in the paper submitted by Mr. Robbins some statements, as usual, where purportedly there has been preferences, where his client has been damaged and hurt.

The Court: I am not interested in that.

Mr. Rosen: I wanted to bring that out.

The Court: I thought I made very clear the basis for my bringing this matter on, and that was the Court's alarm

at the fact that after having held these men disqualified for a purely technical statutory reason the Court sat on its [fol. 10532] hands in the hope that it might be able to resolve this whole problem. Realizing that much time will go by before the whole problem is resolved, the Court felt that it could no longer in good conscience permit this condition to continue. I am not interested in how much space Rehrig gets in advertising or the fact that he does not like Fried or Fried does not like him. That does not bother me in the least. What I am interested in is having made a pronouncement I have done nothing since January to put that pronouncement into effect, and for the reason heretofore explained, that I thought the whole matter could be resolved. I realize it cannot be resolved within a reasonable time.

Finally, I ask if anyone wishes to be heard further on (a), (b) or (d) of the present moment?

No one indicating a desire to be heard, I will continue.

Taking the matters seriatim, as set forth in the order to show cause, the branch of the petition designated (a) for termination of compensation pursuant to Section 249 has already been granted by memorandum decision dated January 4, 1960.

To the extent that the branch of the petition designated (a) seeks restitution and recoupment of past compensation [fol. 10533] and past reimbursement of expenses it is denied.

The next proceeding to dispose of is the branch of the petition designated (b) which asks (1) for removal of the president and general manager of the debtor for misconduct in office, (2) for termination of compensation and reimbursement of expenses and (3) for recoupment of compensation and reimbursed expenses.

The second branch of this application is academic in view of the disposition of the petition bottomed on the violation of Section 249 and hence is denied as moot.

The third subdivision of the second branch of the petition is denied, i.e., for recoupment of compensation and reimbursed expenses.

As to the first branch of the petition (which has been abandoned as to respondent Laupheimer), there is no au-

thority for the Court to order directly the removal of an officer or agent of the debtor. However, in view of the Court's disposition of the petition for termination of compensation to Messrs. Weinstein and Fried, they can no longer function in their respective offices of president and general manager of the debtor.

Section 188 of the Bankruptcy Act provides:

[fol. 10534] "A debtor continued in possession of its property shall have all the title, be vested with all the rights, be subject to all the duties, and exercise all the powers of a trustee appointed under this chapter, subject, however, at all times to the control of the judge and to such limitations, restrictions, terms, and conditions as the judge may from time to time prescribe."

Section 189 of the Bankruptcy Act allows a trustee or debtor in possession to "operate the business and manage the property of the debtor" under judicial authorization.

The following are now made terms and conditions of the continuation of the debtor in possession and the operation by it of the business and management of the property of the debtor:

(a) Jerome Fried will be discharged from the debtor's employ at once.

(b) Arnold A. Weinstein, president of the debtor, shall have nothing further to do with the operation of its business and affairs, and management of its property.

(c) No funds of the debtor shall be disbursed except on the countersignature of Martin H. Philip, as treasurer, [fol. 10535] whose election is hereinafter confirmed.

(d) Pending the approval by the Court of the employment of a general manager of the debtor, Martin H. Philip shall supervise its affairs.

I see that Mr. Philip is in the courtroom. Do you undertake to do so, sir?

Mr. Philip: I do, your Honor.

The Court: Parenthetically, I want all persons interested who choose to place nominations for general manager to

have those nominations in the hands of the examiner within 48 hours. I am asking the examiner to immediately interview those nominees and then to set up a schedule of interviews with the Court so that a general manager can be appointed to take over as quickly as possible.

The third matter, i.e., the petition for cancellation or rejection of Enterprises' lease designated as subdivision (c) and for an accounting will be heard at 10:30 A.M. on September 26, 1960, in room 1506. Please check the room number, because the Clerk may assign a different room for that day.

As of the present time, that is the room I am assigned to.

Finally, the petition for approval of the election of offi- [fol. 10536] cers and directors of the debtor designated as subdivision (d) is granted.

It is so ordered. No further order is necessary.

Mr. Rosen: Your Honor, if I understand that last portion, as I understand the election of directors, they were Mr. Weinstein, Mr. Laupheimer and Mr. Philip—

The Court: And then Mr. Weinstein was elected president, Mr. Philip was elected treasurer and Mr. Laupheimer was elected vice-president. There were three—how many directors were elected?

Mr. Rosen: Three directors.

The Court: And they were Messrs. Weinstein, Danciger and Philip. The directors then met and they elected officers. They elected Mr. Weinstein as president. They elected Mr. Philip as treasurer. Then they elected Mr. Danciger as what?

Mr. Weinstein: Secretary, I believe. Mr. Laupheimer, who was not a director, was elected vice-president.

Mr. Rosen: I am merely trying to understand your Honor's ruling or the effect of it.

The Court: The effect of my ruling is this: that although [fol. 10537] Mr. Weinstein was elected president, and although I am now confirming his election of president because of the fact as I have stated that I have no power to remove him, I nevertheless, because of his trading in the stock, direct that he have no part in the operation of the debtor or the management of its property.

That raises the question: who succeeds to his powers? That is, if it becomes important. The by-laws of the debtor, so far as I can ascertain, do not specifically provide that the vice-president automatically succeeds to the powers of the president in the event of a vacancy or disability of any kind. If any question arises as to powers here, the parties will have to come before the Court again. I do not wish to anticipate.

However, in the interim, I am providing as to the fiscal affairs of the company, Mr. Philip, the treasurer, will undertake, at least in so far as the signing of checks is concerned, the functions of the treasurer, and that the parties immediately consult with the examiner for the purpose of our employing a new managing agent.

Mr. Rosen: So that technically the officers stand as is, [fol. 10538] and I as attorney for the debtor, if I have to have any petitions signed, I still come to an officer for the signing of a petition, but as far as the physical operations of the business itself, that has been designated to Mr. Philip.

The Court: I cannot see how Mr. Weinstein can adhere to the Court's direction that he have nothing to do with management and operation and still sign petitions, if that is what you have in mind.

Mr. Rosen: Whom am I as attorney for the debtor to apply to?

The Court: You have a vice-president, a secretary and a treasurer who are not under the disability that Mr. Weinstein is under. If I had the power, I would remove from Mr. Weinstein as president because he traded in the stock. But I don't have that power. I only have the power to tell the debtor in possession how it shall manage the affairs and operate the property of the debtor. What I am saying now is because and solely because of Mr. Weinstein's trading in the stock he can have no hand in management and operation.

I had hoped to avoid that by having a disposition of the entire matter before this time. But I can see now that that [fol. 10539] is impossible, and I cannot remain silent any longer.

Mr. Seligson: Mr. Rosen is not affected in any way.

The Court: Of course not. Mr. Rosen remains counsel for the debtor. The only thing is he won't be able to deal with Mr. Weinstein as he has done properly heretofore.

Mr. Seligson: The board of directors can meet and authorize the vice-president to take action on behalf of the corporation—or the treasurer.

Mr. Robbins: I would like to ask the Court for clarification. Number 1, I believe the Court stated that the removal petition had been withdrawn with respect to Mr. Laupheimer.

The Court: I so understood.

Mr. Robbins: Your Honor, that probably is my fault, but my understanding was that it was the first petition under Section 249 that was withdrawn and not the second on removal. For those purposes, your Honor might care—

The Court: In the first place, I have ruled that I have no power to remove any officer.

Mr. Robbins: I am only trying to get the record [fol. 10540] straight.

The Court: With respect to Section 249, they overlap. I understood that subdivision (b) of your present show cause order was intended to cover the possibility that was engendered by the referee's decision that Section 249 did not apply to this situation, to try and bring it within the general equity powers of the Court. I have no power to remove any officer. I have power to determine compensation. I have now determined as of this day that there will be no compensation paid to Mr. Fried and to Mr. Weinstein.

I have now determined that despite the fact that there will be no compensation in the future for good and sufficient equitable reasons they will not be compelled to reimburse either compensation or expenses.

Mr. Robbins: May I ask one more thing, your Honor?

The Court: Yes.

Mr. Robbins: There has been no ruling, no finding made and no specific conclusions as to some of the other charges made under the removal petition with respect to the re-

duction of rents paid by Enterprises and with respect to the Sunday rents.

The Court: I won't make any such findings until I go [fol. 10541] into the question of the Enterprises' lease.

Mr. Robbins: May I ask whether the denial of petitioners with respect to recoupment and compensation are in any way based on findings with respect to the rents at the Market?

The Court: I don't understand your question.

Mr. Robbins: The removal petition in particular alleges certain facts with respect to the Enterprises' rents paid to the Market and with respect to the Lagrotte rents which were allegedly diverted from the Market to Enterprises.

The Court: Mr. Robbins, I thought I made my position clear; that regardless of the justification therefor I have no power to remove the officers of the debtor.

Mr. Robbins: I am addressing myself to the recoupment aspect. There has been a decision on the recoupment where the underlying petition deals also with this rent situation, and to that extent I am just trying to ascertain whether the recoupment aspect involves in any way a denial of the petition—let me amend that—whether your Honor's decision on the recoupment in a sense sub silencio determines that there was no diversion of rents and there was no im-[fol. 10542] proper failure to pay the proper rents?

The Court: Where is the distinction at least so far as Enterprises is concerned between what you are talking about and subdivision (c) which calls for an accounting by the lessee?

Mr. Robbins: The facts are the same, that is quite true, but what I am trying to understand is this: Your Honor has denied clearly the petition for recoupment under both Section 249 and the removal petition, and in denying the recoupment presumably your Honor is saying—

The Court: The sub silencio aspect will be immediately eliminated from the record. Under no circumstances am I of the disposition to require either Fried or Weinstein to give the debtor back anything. What that leaves open in so far as Enterprises is concerned is an accounting by the lessee. That will be heard on September 26th. But so far

as Fried's sharing in the profits of the food company, J & J, I believe it is, I have no intention and I have a definite intention not to direct him to make any such recoupment of that compensation or expenses. However, that is not to be understood to say that on September 26th or thereafter, when we resolve the question of the Enterprises' lease, he [fol. 10543] may not, if he is found to have unfairly dealt with the debtor, be required to make an accounting under that lease.

Does that answer your question?

Mr. Robbins: Your Honor, I think it answers my question. I think I understand, thank you, sir.

The Court: I make provision that this decision shall constitute the Court's findings and conclusions. The parties are relegated to the rule that if anyone wants additional findings and conclusions they may be submitted on notice.

Mr. Rosen: May I kindly ask for an opportunity to submit a cross-order on the original order that was submitted by Mr. Robbins?

The Court: I am not signing Mr. Robbins' original order. I am making my decision today under an order of the Court, with the right of any party to submit a long form order if they choose. Under the general practice in the court, if anybody submits a long form order, anybody else has the right to submit a cross-order.

Mr. Rosen: Would your Honor consider a stay in the orders that are being submitted?

The Court: Denied. Get your stay in the Court of Ap- [fol. 10544] peals, if you want to take it up.

Mr. Rosen: There was one remark by Professor Seligson that the board of directors would have to meet. Let us say I have to draw something, a simple lease, will I have to call the board of directors?

The Court: Mr. Rosen, you are counsel for the debtor, not the examiner. The examiner gratuitously attempted to answer your question, but the resolution of what the legal requirements are is your obligation.

Mr. Rosen: Thank you, your Honor.

Mr. Fried: Your Honor, on the question of removal. Was that based on Section 249?

The Court: You are not being removed as anything.

Mr. Fried: You are removing me as general manager.

The Court: I am just terminating your employment. You are not an officer of the corporation, although you are a fiduciary. I say I don't have the power to remove Mr. Weinstein. I do say I have the power to direct the debtor that neither you nor he have anything to do with the management and operation of the debtor's affairs from this moment on.

[fol. 10545] Mr. Fried: I understand that.

The Court: I can't remove Mr. Weinstein as president. But I automatically removed you as general manager when I provided you can have nothing further to do with the management. You are finished.

Mr. Fried: I understand that. Just for information, was it based on Section 249?

The Court: Yes, it was based on the fact that you as a fiduciary improperly dealt in the stock of the company.

As Mr. Robbins pointed out, he made a motion that you be compelled to return to the debtor certain moneys obtained by you or your corporation Enterprises by virtue of the track lease and moneys obtained by you by virtue of your interest in some manner in the J & J lease. I have indicated that I will not compel you to return any salary, any expenses or any profits made by you by virtue of the J & J matter. However, I have provided for an accounting by Enterprises when I ultimately hear the question of cancellation or action on the present lease for the track. That remains open. Do you understand that?

Mr. Fried: I understand that part of it, your Honor. Was the ground that I have nothing to do with the Market [fol. 10546] based on the fact that I purchased the stock?

The Court: Yes.

Mr. Fried: It was just a matter of curiosity. So I made a mistake in purchasing stock. The idea of working for the Market and staying on the job has nothing to do with my pay.

The Court: I won't permit anybody to work for the Market without compensation. That would be a very curious

and doubtful situation. I will have no part of it, if that is what you are suggesting.

Mr. Fried: The merchants at the Market at one time submitted—

The Court: I refuse to entertain any idea that will permit you to have anything to do with the debtor, because you dealt in the debtor's securities and Congress said you cannot be compensated if you deal in the debtor's securities. Also I say that I will have nobody working in that Market without compensation or having his compensation paid by somebody else. That is a unique situation. I will have no part of it.

Mr. Fried: I feel a lot better now.

Mr. Weinstein: Your Honor has directed that I have [fol. 10547] nothing to do with the physical operation of the Market.

The Court: I have used the language of the statute, I have not limited it to operate. You shall have nothing to do with operating the business and managing the property of the debtor. That is in Section 189.

Mr. Weinstein: Just to make the matter quite specific in my own mind, because I don't want to go over the line that your Honor has drawn, your Honor has indicated that the directors and officers have not been removed. Would I be in contempt of your Honor if I participated in a meeting of the board of directors? I certainly do not wish to be in that position.

The Court: I hate to be put in the position of an advocate. I would suggest you discuss that with counsel for the debtor. He ultimately will be paid for his services to the debtor and I think the Court's order is quite clear. I made it clear that if I had the power I would have removed you as president because you trade in the stock, but I don't have the power. However, I do have power to say who shall manage the debtor's affairs. Because you trade in the stock, you are not one of those people. If in the light [fol. 10548] of that the counsel for the debtor undertakes to let you participate in the affairs of the debtor, that is up to him. If anybody moves for your punishment for con-

tempt, I will have to cross that bridge when we come to it. I am not an advocate here.

Mr. Weinstein: After all this, I certainly do not want to cross any further lines.

The Court: Is there anything else?

Mr. Weinstein: Inasmuch as there has been a fairly lengthy statement of your Honor's views here, may I respectfully request that a copy of your Honor's decision be transcribed and a copy of that delivered to the attorney for the debtor at the debtor's expense.

The Court: Don't we have a standing order for this entire record, Mr. Rosen?

Mr. Rosen: Yes, your Honor.

The Court: As a matter of fact, Mr. Rosen on one or two occasions brought to the Court's attention the tremendous expense of the records in this case.

Mr. Rosen: If your Honor has stated his ruling now, the minutes probably will take some time and then orders are to be submitted, am I to understand that as of this very moment their salaries cease?

[fol. 10549] The Court: Yes, not only their salaries cease, but their connection with the corporation ceases.

Mr. Rosen: If a long form order was served--

The Court: The time for appeal starts running as of today.

Mr. Seligson: In order to avoid any misunderstanding and any hitches in the continued operation of the business, you designated Mr. Philip as the one who should take over. May I suggest that you sign some short form order so that money can be withdrawn, so that expenses can be paid.

The Court: Why can't the directors adopt the usual resolution in line with the Court's direction.

Mr. Seligson: If Mr. Rosen is instructed to get the directors together—

The Court: Mr. Rosen as counsel for the debtor will do everything, I am sure, that is necessary under the Court's order to keep the debtor operating.

Mr. Rosen: I will try.

The Court: I don't think any order is necessary. In any event, the bank would require a resolution, which I believe

is common practice. I don't recall having signed any order in connection with the bank accounts of the debtor.

* * * * * * *

[fol. 10551] The Court: If there is nothing further to come before the Court, we are adjourned until September 26, 1960, at 10:30 A.M.

* * * * * * *

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 10552]

SAUL, GENERAL'S EXAMINER'S EXHIBIT BC

Extract from Concession Agreement dated January 29, 1952 between Nazareth Fair Grounds & Farmers' Market, Inc. and James LaGrotte

1. Lessor gives and grants, at any and all events, to Concessionaire the right and privilege to prepare, dispense and sell food, drinks and beverages for consumption on the Fairgrounds premises during market nights, excepting only therefrom the right to prepare and sell popcorn on the premises. It is specifically understood and agreed that this concession agreement shall be limited to the Wednesday and Saturday nights (Market Nights) and shall not include any Fair operation nor any Race Track or other promotional items held at other times on the premises, unless some definite agreement as to that type of operation shall first be agreed upon by the parties hereto.

* * * * * * *

[fol. 10553] 3. Concessionaire covenants and agrees to pay to the lessor as percentage rental fifteen (15%) percent of any and all gross income received by the concessionaire from the operation of the concession space constituting the subject matter of the contract. * * *

4. It is agreed that the term gross sales in this Agreement shall be deemed to mean all receipts from the conduct of business by the concessionaire on the demised premises and all transactions had therein, including, but without being limited to, the gross sales of merchandise, whether sold for cash or on a charge basis, collected or uncollected, and all charges made for the rendition of services of any kind whatsoever.

* * * * * * *

9. Concessionaire and lessor agree that the term of this agreement shall commence with the date of its signing and shall continue for a term of three (3) years thereafter, which term shall be automatically renewed on a monthly basis, unless lessor shall notify concessionaire of a contrary

intention at least six months before the termination of this agreement and it is hereby agreed that either party may determine this lease agreement at the end of said term by giving to the other party written notice of at least six months prior thereto, but in default of such notice, this lease agreement shall continue upon the same terms and conditions and covenants as are herein contained for a period of one month and so on from month to month unless or until terminated by either party hereto giving the other at least six months written notice of such termination. The lessor, notwithstanding the provisions of this paragraph or any of the other provisions of the lease agreement, may at any time after the first year of the term of this lease agreement, cancel this lease agreement by giving at least sixty days written notice to the concessionaire.

[fol. 10554] 10. Concessionaire covenants and agrees that it will do none of the following things without the written consent of the lessor first had and obtained.

* * * * * * *

(b) Assign this lease or underlet or sublet the demised premises or any part thereof, or permit any other person, corporation to occupy the demised premises or any part thereof. * * *

* * * * * * *

15. It is expressly understood and agreed by and between the parties hereto that this lease sets forth all the promises, agreements, conditions and understandings between lessor and concessionaire relative to the demised premises, and that there are no promises, agreements, conditions or understandings, either oral or written between them other than are herein set forth. It is further understood and agreed that, except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this lease shall be binding upon lessor or concessionaire unless reduced to writing and signed by them.

Saul, General: Examiner's Exhibit (Ledger Sheet - Zoloth and Soble)

		M Soble Capital	J Malakoff Capital	M Zolath Capital	M. Soble Loan	M. Zolath Loan	Capital
1	ORIGINAL INVESTMENT	40000 -					
2	4/7/51		12489				
3	8/7/51	38500 -		1500	37000		
	5/8/51 CASH RECEIVED		5000				
4	8/7/51		17489				
			J MALAKOFF LOAN				
	8/7/51		17489				
	8/7/51 LOSS FOR PERIOD	67654		67654			
5	BALANCE OF PARTNERSHIP 8/7/51	82356	17489	82356	37000		
5	OPENING OF CORP. 8/7/51		17489		37073 46	736	1500
6	JAN 52		9507 / 6776				
	CLOSING 6/30/52						
7	J. ENTRY #17	6800					
8	#13		37146 92		37073 46	736	-
9	#14		8750 -				
10	RECLASSIFICATION ENTRY #3		2000 - / 7179 47				
	CORP. BALANCE 7/1/52		68092 92				1500
11	4/5/53 JE		350 -				
			68429 92				

J MALAKOFF LOAN
17489
8/7/51 LOSS FOR PERIOD 67654 67654
5 BALANCE OF PARTNERSHIP 8/7/51 82356 17489 82356 37000
5 OPENING OF CORP. 8/7/51 17489 37073 46 736 1500
6 JAN 52 9507 / 6776
CLOSING 6/30/52
7 J. ENTRY #17 6800
8 #13 37146 92 37073 46 736 -
9 #14 8750 -
10 RECLASSIFICATION ENTRY #3 2000 - / 7179 47
CORP. BALANCE 7/1/52 68092 92 1500
11 4/5/53 JE 350 -
68429 92

opening Entry 4/17/51 to record

Sold Selby Seattle Co
Insurance
Jacket
nty Dr
1st nty
2nd nty
loan n/c
loan M R
M Soble

opening Entry 4/17/51 General Journal to record purchase of bus

Sold Selby Seattle Coach 46000
Insurance 45630 / 4578 / 3969
Jacket 4545
nty Dr 26350
1st nty 8500
2nd nty 10000
loan n/cwy 5000
loan M R 37146 92
M Soble Cap 40000

[fol. 10556]

Saul, General: Examiner's Exhibit BY

GILBERT SUNSHINE
CERTIFIED PUBLIC ACCOUNTANT
466 Central Avenue Jersey City, New Jersey
Journal Square 4-5555

Charles Seligson, Esq.
350 Fifth Avenue
New York 1, New York

Dear Mr. Seligson:

In accordance with the order of the Honorable Sidney Sugerman, United States District Judge, Southern District of New York in the matter of Nazareth Fairgrounds and Farmers Market, Inc., Debtor (hereinafter referred to as Debtor) in proceedings for the Reorganization of a Corporation no. 89669, dated October 3, 1956, appointing you as Examiner, I have compiled, at your request, from the available books and records of the Debtor, and present herewith, Exhibits reflecting the financial position of the Debtor and the results of its operations from its inception to June 30, 1956.

Inasmuch as the Court has not yet adjudicated the many claims now pending, including the unpaid indebtedness prior to these Chapter X proceedings, these figures are subject to further adjustment. It must be borne in mind that all the expenses of administration have not yet been determined; in addition to those already reflected herein, there are undeterminable amounts applicable to the periods under review. No reserve for Federal or State taxes have been provided since the value of the claims allowable is incalculable at present.

The Exhibits and Schedules contained herein have been prepared from the available books and records of the Debtor, without audit. The notes and comments that follow are integral parts of these Exhibits and Schedules. Final reconstruction of the records of the Debtor may produce modifications hereof.

In viewing the Pro Forma Exhibits, it must be understood that they will all be revised by the allowable claims, before final statements can be prepared.

Respectfully submitted,

Gilbert Sunshine

GILBERT SUNSHINE

October 15, 1956
Jersey City, N. J.

Matter of Nazareth Fair Grounds & Farmers' Market, Inc., Debtor
C.A.2 Docket No. 27000 (Reorganization--S.D.N.Y. No. 889669)
General: Examiner's Exhibit BY

[fol. 10557]

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Index to Exhibits and Schedules

Exhibit

A	Purchase of fairgrounds by Morris Soble.
B-1	Balance Sheet, August 7, 1951 Last Date of Partnership.
B-2	Balance Sheet, August 8, 1951 First Date of Corporation.
C	Balance Sheet, June 30, 1952
D	Statement of Income and Loss August 8, 1951 to June 30, 1952
E	Pro Forma Balance Sheet, July 31, 1953
F	Pro Forma State of Income and Profit July 1, 1952 to June 30, 1953
G	Pro Forma Balance Sheet, July 31, 1954
H	Pro Forma Statement of Income and Profit July 1, 1953 to June 30, 1954
I	Pro Forma Balance Sheet, July 31, 1955
J	Pro Forma Statement of Income and Profit July 1, 1954 to June 30, 1955
K	Pro Forma Balance Sheet, July 31, 1956
L	Pro Forma Statement of Income and Loss July 1, 1955 to June 30, 1956

Schedules

1	Schedule of Cash Income by months - August, 1951 to June 30, 1956
2	Schedule of Cash Receipts July 1, 1956 - Aug. 18, 1956 and Estimated Average Annual Rentals.
3	Schedule of Insurance currently in effect.

GILBERT SUNSHINE

Certified Public Accountant

[fol. 10558]

EXHIBIT "A"

NAZARETH FAIRGROUNDS AND FARMERS MARKET

April 17, 1951

Purchase of Business by Morris Soble

Land and Building	$66000.00	
Settlement Costs	456.50	
Insurance	45.78	
Taxes	39.69	
Cost of Land and Building		$66541.97
Due thereon:		
Accrued Taxes	45.48	
Accrued Interest	263.50	
First Mortgage	8500.00	
Second Mortgage	10000.00	
Loan - Max Levy	5000.00	
Loan - Murray Realty Co.	2732.99	26541.97
Capital - Morris Soble		$40000.00

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

CHERNOFF SUNSHINE
Certified Public Accountants

[fol. 10559]

EXHIBIT "B-1"

NAZARETH FAIRGROUNDS & FARMERS MARKET

Balance Sheet - August 7, 1951

ASSETS

Current:	Cash in Bank		$ 1167.17	
	Cash on Hand		50.00	
	Prepaid Insurance		1284.00	$2501.17
Fixed:	Deposit as Security		50.00	
	Land		6000.00	
	Buildings	$60456.50		
	Less: Reserve for Depn.	806.09	59650.41	
	Improvements	979[illegible].64		
	Less: Reserve for Depreo.	717.66	9276.98	75277.39
Other:	Loan Receivable - Murry Realty			3615.52
Total Assets				$81394.08

LIABILITIES AND CAPITAL

Current:	Accrued Payroll		$ 95.00	
	Withholding & Payroll taxes payable		185.42	
	Accounts Payable		4477.74	34758.16
Other:	Loans Payable - Max Levy		2500.00	
	Loans Payable - Morris Soble		37000.00	
	Loans Payable - J. Malakoff		17489.00	
	First Mortgage Payable		8500.00	
	Second Mortgage Payable		9500.00	74989.00
Total Liabilities				79747.16
Capital:				
	Morris Soble, Capital		823.46	
	Milton Zolath, Capital		823.46	
Total Capital				1646.92
Total Capital and Liabilities				$81394.08

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10560]

EXHIBIT "B-2"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Balance Sheet - August 8, 1951

ASSETS

Current:	Cash in Bank		$ 1157.17	
	Cash on Hand		50.00	
	Prepaid Insurance		1284.00	$2501.17
Fixed:	Deposits as Security		50.00	
	Land		6000.00	
	Building	$60456.50		
	Less:			
	Reserve for Depreciation	806.09	59650.41	
	Improvements	9794.54		
	Less:			
	Reserve for Depreciation	217.66	9576.98	75277.39
Other:	Loan Receivable - Murray Realty			3615.52
Total Assets				$81394.08

LIABILITIES AND CAPITAL

Current:	Accrued Payroll	$ 95.00	
	Withholding and Payroll taxes payable	186.42	
	Accounts Payable	4477.74	$4758.16
Other:	Loans Payable - M. Soble	37073.46	
	Loans Payable - K. Zolath	73.46	
	Loans Payable - Max Levy	2500.00	
	Loans Payable - J. Malakoff	17489.00	
	First Mortgage Payable	6500.00	
	Second Mortgage Payable	9500.00	75135.92
Total Liabilities			79894.08
Capital:			
	Capital Stock:		
	Authorized, 200 shares, no par		
	Issued and outstanding 20 shares		1500.00
Total Liabilities and Capital			$81394.08

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10561]

EXHIBIT "C"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Balance Sheet - June 30, 1952

ASSETS

Current:	Cash in Bank		$ (371.40)	
	Cash on Hand		50.00	
	Prepaid Insurance		3284.44	$2963.04
Fixed:	Deposit as Security		50.00	
	Land		6000.00	
	Buildings	$70543.50		
	Less: Reserve for Dep.	3228.37	67315.13	
	Improvements	12256.14		
	Less: Reserve for Dept.	849.88	11606.26	84971.39
Other:	Organization Expenses			349.65
Total Assets				$88284.08

LIABILITIES AND CAPITAL

Current:	Accrued Payroll	$ 160.50	
	Withholding taxes payable	104.40	
	F.C.A.B. taxes payable	91.24	
	Unemployment taxes payable	78.62	
	Accounts payable	589.61	$1024.37
Other:	Notes Payable - Insurance Financing	2781.24	
	Loans Payable - J. Malakoff	6892.92	
	First Mortgage Payable	8500.00	
	Second Mortgage Payable	8000.00	87374.16
Total Liabilities			88398.53
Capital and Surplus:			
	Capital Stock:		
	Authorized, 200 shares, no par		
	Issued and outstanding, 20 shares	1500.00	
	Deficit per Exhibit D	(1514.45)	
Deficit in Capital			(114.45)
Total Liabilities and Capital			$88284.08

( ) Denotes red figures.

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10562]

EXHIBIT "F"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Pro Forma Statement of Income and Profit
July 1, 1952 to June 30, 1953

Income:		
Rental Income - market	$41761.58	
Rental Income - race track	5086.55	
Concession Commissions	6117.27	
Miscellaneous Income	2668.16	
Rodeo Rental	1000.00	
Total Income		$56633.56
Operating Expenses:		
Salaries	12965.63	
Payroll taxes	595.00	
Market Supplies & Expense	4984.08	
Heat, Light & Power	5830.86	
Cleaning & Sanitation	2279.14	
Garbage Disposal	893.00	
Water	239.96	
Insurance	2774.26	
Repairs	10904.46	
Office Expenses	563.20	
Dues	20.00	
Telephone	1143.09	
Professional Fees	1615.50	
Travel	19.98	
Advertising	6740.04	
Entertainment	170.00	
Bank Charges	37.40	
Interest	644.48	
General Taxes	324.00	
Depreciation: Buildings	2821.74	
Depreciation: Improvements	1389.68	
Total Operating Expenses	56609.40	
Less: Purchase Discounts	199.21	
Net	5[illegible]3.19	
Less: Insurance proceeds recoverable for losses applicable to expenditures incurred	11211.78	
Net Operating Expenses		44501.41
Operating Profit		12042.17
Less: Loss on Sale of Heater		850.04
Net Profit for the period		$11192.13

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10563]

EXHIBIT "G"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Pro Forma Balance Sheet - June 30, 1954

ASSETS

Current:	Cash in Bank - Nazareth, Pa.		$(1152.10)	
	Cash in Bank - New York, N. Y.		(557.46)	
	Cash on Hand		70.25	
	Accounts Receivable - J. Malakoff		11611.78	
	Accounts Receivable - others		2000.00	
	Prepaid Insurance		1360.22	
	Prepaid Expenses		225.35	$13726.64
Fixed:	Deposit as Security		250.00	
	Land		6000.00	
	Building	$74177.96		
	Less: Reserve for Dep.	8948.45	65229.51	
	Improvements	30059.27		
	Less: Reserve for Dep.	4369.39	25689.88	97169.39
Other:	Loans Receivable - J. Malakoff		3898.85	
	Loans Receivable - others		1082.03	
	Organization Expenses		349.65	5330.53
Total Assets				$116226.56

LIABILITIES AND CAPITAL

Current:	Accrued Payroll	$ 565.35	
	Withholding Taxes Payable	760.98	
	F.C.A.B. Taxes Payable	153.83	
	Unemployment Taxes Payable	241.86	
	Accounts Payable	18968.56	20690.58
Other:	Notes Payable - Insurance Financing	2694.10	
	Notes Payable - others	1000.00	
	Loans Payable - J. Malakoff	68442.92	
	Loans Payable - others	503.95	
	First Mortgage Payable	8500.00	
	Second Mortgage Payable	4000.00	85140.97
Total Liabilities			105831.55
Capital and Surplus:			
	Capital Stock:		
	Authorized 200 shares, no par		
	Issued&outstanding, unknown	1500.00	
	Surplus 7/1/53 $ 9577.68		
	Add: Profit per Exhibit B 2117.33		
	Surplus 6/30/54	11695.01	
Total Capital and Surplus			11195.01
Total Liabilities and Capital			$116826.56

( ) Denotes red figures.

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE

Certified Public Accountants

[fol. 10564]

EXHIBIT "P"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Statement of Income and Loss -
August 8, 1951 to June 30, 1952

Income:		
Rental Income - market	$37454.63	
Rental Income - race track	933.17	
Commissions	323.46	
Miscellaneous	468.98	
Total Income		$39180.24
Operating Expenses:		
Salaries	2074.74	
Payroll Taxes	383.25	
Market Supplies & Expenses	1758.39	
Heat, Light & Power	2567.89	
Cleaning & Sanitation	1393.00	
Garbage Disposal	196.50	
Water	291.51	
Insurance	1435.79	
Repairs	4813.64	
Office Expenses & Services	2410.00	
Telephone	191.76	
Professional Fees	390.00	
Travel & Entertainment	2496.66	
Truck Expenses	568.00	
Advertising	2966.14	
Bank Charges	29.46	
Interest	953.86	
General Taxes	136.71	
Depreciation Buildings	2422.28	
Depreciation Improvements	732.22	
Total Operating Expenses	41211.80	
Less: Insurance proceeds recoverable for losses applicable to expenditures incurred	417.11	
Net Operating Expenses		40794.69
Net Loss for the period		$(1614.45)

( ) Denotes red figures.

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10565]

EXHIBIT "E"

NAZARETH FAIRGROUNDS & FARMERS MARKET, INC.

Pro Forma Balance Sheet - June 30, 1953

ASSETS

Current:	Cash in Bank		$ (471.93)	
	Cash on Hand		70.25	
	Accounts Receivable - J. Malakoff		11811.78	
	Prepaid Insurance		5662.60	
	Prepaid Expenses		262.24	$17354.94
Fixed:	Deposit as Security		50.00	
	Land		6000.00	
	Building	$70543.50		
	Less: Reserve for Dep.	6050.11	64493.39	
	Improvements	22770.19		
	Less: Reserve for Dep.	2204.60	20565.59	91108.98
Other:	Loans Receivable - J. Malakoff		3898.85	
	Organization Expenses		349.65	4248.50
Total Assets				$112711.42

LIABILITIES AND CAPITAL

Current:	Accrued Payroll	253.90	
	Withholding taxes payable	126.56	
	F.C.A.B. taxes payable	36.57	
	Unemployment taxes payable	175.32	
	Accounts payable	10068.84	10610.39
Other:	Notes Payable - Insurance Financing	5185.71	
	Notes Payable - others	1000.00	
	Loans Payable - J. Malakoff	6842.92	
	Loans Payable - others	1895.72	
	First Mortgage Payable	9500.00	
	Second Mortgage Payable	6090.00	31024.35
Total Liabilities			101634.74
Capital and Surplus:			
	Capital Stock:		
	Authorized, 200 shares, no par		
	Issued and outstanding, 20 shares	1500.00	
	Deficit 7/1/52	$(1614.55)	
	Add: Profit per Exh. F	11192.23	
	Surplus 6/30/53	9577.68	
Total Capital and Surplus			11077.68
Total Liabilities and Capital			$112712.42

( ) Denotes red figures.

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10566]

EXHIBIT #48

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Pro Forma Statement of Income and Profit
July 1, 1957 to June 30, 1958

Income:			
	Rental Income - market	$44747.76	
	Rental Income - race track	7455.69	
	Concession commissions	7753.76	
	Other income	2392.04	
Total Income			$61949.27
Operating Expenses:			
	Salaries	19452.98	
	Payroll Taxes	855.25	
	Market Supplies & Expenses	1734.67	
	Heat, Light & Power	6307.75	
	Cleaning & Sanitation	2704.30	
	Garbage Disposal	658.00	
	Water	326.50	
	Insurance	3706.15	
	Repairs	2086.70	
	Office Expenses	696.46	
	Dues	20.00	
	Telephone	805.01	
	Professional Fees	8015.50	
	Travel	612.00	
	Advertising	737.62	
	Bank Charges	62.20	
	Interest	856.41	
	General Taxes	520.00	
	Depreciation: Building	2894.34	
	Depreciation: Improvements	2164.79	
Total Operating Expenses		61846.63	
Less:	Purchase Discounts	214.69	
Net		61631.94	
Less:	Insurance Proceeds recoverable for losses applicable to expenditures incurred	2000.00	
Net Operating Expenses			59631.94
Net Profit for Period			$ 2317.33

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10567]

EXHIBIT "I"

NAZARETH FAIRGROUNDS & FARMERS MARKET, INC.

Pro Forma Balance Sheet - June 30, 1955

ASSETS

Current:	Cash in Bank - Nazareth, Pa.		$(1152.10)	
	Cash in Bank - New York, N. Y.		(487[illegible].95)	
	Cash on Hand		70.25	
	Accounts Receivable - J. Malakoff		11811.78	
	Accounts Receivable - others		12283.62	
	Prepaid Insurance		3129.23	
	Prepaid Expenses		127.43	$21395.26
Fixed:	Deposit as Security		250.00	
	Land		6000.00	
	Building	$106815.57		
	Less: Reserve for Dep.	12569.23	94246.34	
	Improvements	37925.91		
	Less: Reserve for Dep.	7390.25	30535.66	131032.00
Other:	Loans Receivable - J. Malakoff		3898.85	
	Loans Receivable - others		1082.03	
	Organization Expences		349.65	5330.53
Total Assets				$157757.79

LIABILITIES AND CAPITAL

Current:	Accrued Payroll		$ 888.29	
	Withholding Taxes Payable		710.20	
	F.C.A.B. Taxes Payable		225.93	
	Unemployment Taxes Payable		342.74	
	Accounts Payable		37824.77	$39991.93
Other:	Notes Payable-Insurance Financing		1461.33	
	Notes Payable - others		1000.00	
	Loans Payable - J. Malakoff		68442.92	
	Loans Payable - others		503.95	
	First Mortgage Payable		8500.00	
	Second Mortgage Payable		2000.00	
	Third Mortgage Payable		14000.00	95928.20
Total Liabilities				$135920.13
Capital and Surplus:				
	Capital Stock: Authorized 200 shares, no par; issued and outstanding, unknown		1500.00	
	Surplus 7/1/54	$11895.01		
	Add: Profit per Exhibit J	8442.65		
	Surplus 6/30/55		20337.66	
Total Capital and Surplus				21837.66
Total Liabilities and Capital				$157757.79

( ) Denotes red figures.

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10568]

EXHIBIT "J"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC

Pro Forma Statement of Income and Profit
July 1, 1954 to June 30, 1955

Income:			
	Rental Income - market	$51689.70	
	Rental Income - race track	5210.25	
	Concession Commissions	7807.36	
	Other Income	1853.19	
Total Income			$66558.50
Operating Expenses:			
	Salaries	21709.90	
	Payroll Taxes	1193.34	
	Market Supplies & Expenses	1569.03	
	Heat, Light & Power	6751.37	
	Cleaning & Sanitation	2625.05	
	Garbage Disposal	248.00	
	Water	437.70	
	Insurance	5213.96	
	Repairs	15871.60	
	Office Expenses	648.32	
	Dues	20.00	
	Telephone	903.25	
	Professional Fees	2300.00	
	Travel	756.50	
	Advertising	737[illegible].49	
	Bank Charges	85.51	
	Interest	9[illegible].52	
	General Taxes	567.50	
	Depreciation Buildings	36[illegible].78	
	Depreciation Improvements	3020.86	
Total Operating Expenses		76097.34	
Less:	Purchase Discounts	178.78	
Net		75[illegible].62	
Less:	Insurance proceeds recoverable for losses applicable to expenditures incurred	17352.77	
Net Operating Expenses			58115.85
Net Profit for Period			$ 8442.65

Note: This Exhibit is subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10569]

EXHIBIT "K"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Pro Forma Balance Sheet - June 30, 1956

ASSETS

Current:	Cash in Bank - Nazareth, Pa.		$ (1152.10)	
	Cash in Bank - New York, N. Y.		(3457.04)	
	Cash on Hand		70.25	
	Accounts Receivable - J. Malakoff		11811.78	
	Prepaid Insurance		8922.24	
	Prepaid Expenses		762.33	$16961.46
Fixed:	Deposit As Security		250.00	
	Land		6000.00	
	Building	$106815.57		
	Less: Reserve for Dep.	16841.84	89973.73	
	Improvements	41254.82		
	Less: Reserve for Dep.	10693.18	30761.64	126985.37
Other:	Loans Receivable - J. Malakoff		3898.85	
	Loans Receivable - others		1082.03	
	Organization Expenses		349.65	5330.53
Total Assets				$148877.36

LIABILITIES AND CAPITAL

Current:	Accrued Payroll	$ 695.14	
	Withholding Taxes Payable	687.08	
	F.O.A.B.Taxes Payable	165.58	
	Unemployment Taxes Payable	158.35	
	Accounts Payable	24520.70	$26226.85
Other:	Notes Payable - Insurance Financing	11175.46	
	Notes Payable - others	1000.00	
	Loans Payable - J. Malakoff	68442.92	
	Loans Payable - others	326.20	
	First Mortgage Payable	8500.00	
	Second Mortgage Payable	---	
	Third Mortgage Payable	11900.00	101344.58
Total Liabilities			127571.43
Capital and Surplus:			
	Capital Stock:		
	Authorized 200 shares, no par		
	Issued and outstanding, unknown	1500.00	
	Surplus 7/1/55	$20337.66	
	Loss per Exhibit L	(531.73)	
	Surplus 6/30/56	19805.93	
Total Capital and Surplus			21305.93
Total Liabilities and Capital			$148877.36

( ) Denotes red figures.

Note: These Exhibits are subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10570]

EXHIBIT "L"

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Pro Forma Statement of Income and Loss
July 1, 1955 to June 30, 1956

Income:		
Rental Income - market	$64356.13	
Rental Income - race track	5807.72	
Concession Commissions	7046.06	
Other Income	1771.85	
Total Income		$78981.76
Operating Expenses:		
Salaries	26979.10	
Payroll Taxes	995.00	
Market Supplies & Expenses	2703.13	
Heat, Light & Power	12066.81	
Cleaning & Sanitation	3362.12	
Water	567.70	
Insurance	5277.73	
Repairs	3243.54	
Office Expenses	1803.66	
Dues	20.00	
Telephone	1025.24	
Professional Fees	1012.93	
Travel	443.00	
Advertising	12090.24	
Bank Charges	111.54	
Interest	2107.39	
General Taxes	837.50	
Depreciation: Building	4272.61	
Depreciation: Improvements	1502.93	
Total Operating Expenses	82518.17	
Less: Purchase Discounts	4.68	
Net operating expenses	82513.49	
Less: Damage claim received	3000.00	79513.49
Net Loss for Period		$ (531.73)

( ) Denotes red figures.

Note: These Exhibits are subject to the comments in Letter of Transmittal which is a part of this Exhibit.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10571]

SCHEDULE 1

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Schedule of Cash Income by Months
August 1951 - June 1956

	8/7/51 to 6/30/52	7/1/52 to 6/30/53	7/1/53 to 6/30/54	7/1/54 to 6/30/55	7/1/54 to 6/30/56
July	- -	5948.44	6761.59	6503.82	8136.10
Aug.	2035.12	4934.89	6548.71	6201.21	7004.56
Sep.	5345.80	6021.07	6123.78	6610.35	6535.48
Oct.	4270.15	5840.87	5949.79	5863.32	6193.78
Nov.	3372.17	4500.28	4432.90	4306.89	6190.22
Dec.	2714.37	3999.32	4546.39	3792.51	6590.56
Jan.	2484.95	3419.49	3279.39	3581.83	5324.39
Feb.	2900.59	2649.89	2621.61	3034.36	5337.42
Mar.	3143.75	3128.50	4133.89	3917.43	5601.25
Apr.	3436.29	4614.33	5025.72	5120.21	6326.17
May	4194.94	5230.22	6265.26	6674.09	7770.95
June	4364.11	6670.51	7410.25	7242.48	7972.33
Less: Journal Entrees for re turn rents		(155.00)	(111.79)	(10.00)	(182.00)
Add: Alvance Rentals received				2375.00	
Add: Rents Received by Court Action				822.00	177.75
Rents as per Exhibits C, F, H, J, L	39140.24	56671.58	61999.87	66558.50	78951.76

Note: These Schedules are subject to the comments in Letter of Transmittal which is a part of this report.

GILBERT SUNSHINE
Certified Public Accountant

[fol. 10572]

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Notes to Exhibits

Major items whose disposition effect these Exhibits:

(1) Federal and State Tax Returns have been filed for the year ending June 30, 1952.

(2) Number of stockholders, valid shares issued, the price thereof, and to whom paid.

(3) Any monies that may have been returned to purported or valid stockholders from a special bank account in the Corporate name, not reflected herein.

(4) Validity of loans and notes payable to individuals.

(5) The correct amount of the insurance proceeds recoverable from the storm loss in the year ending June 30, 1953 and the disposition of the monies.

(6) Salary payments claimed. None have been accrued for the manager pending this disposition. Salaries for him are reflected only from the date of Debtors entry into reorganization proceedings, paid per Court order.

(7) The validity of any judgment or suits now pending against the Debtor.

(8) Collectability of Loans and Accounts Receivable which are shown herein.

(9) Accuracy of bills reflected herein, and not paid to date for indebtedness incurred prior to date of reorganization proceedings.

Advance rentals of $2375.00 received in the fiscal year ending June 30, 1955 under lease agreements, included in Schedule "1," properly apply to the year ending June 30, 1956.

Gilbert Sunshine
Certified Public Accountant

Note: These Notes are subject to the comments in Letter of Transmittal which is a part of this report.

[fol. 10573]

NAZARETH FAIRGROUNDS & FARMERS MARKET INC.

Comments

History

Nazareth Fairground & Farmers Market was purchased April 17, 1951 by Morris Soble (see Exhibit "A"). Between April 17, 1951 and August 7, 1951, a partnership was formed for the business. It is not possible to ascertain all the partners, but at the end of the partnership, Morris Soble and Milton Zolath were the partners of record (see Exhibit "B-1").

Nazareth Fairgrounds and Farmers Market, Inc. (hereinafter called *Debtor*) was incorporated August 8, 1951 taking over the assets and liabilities of the partnership, for which 20 shares of stock were issued with a stated value of $1500.00 (see Exhibit "B-2"). The operations of the Debtor for the period August 8, 1951 to June 30, 1952 were examined by Waldbaum, Rochower & Company C.P.A.'s, of Philadelphia, Pa., who prepared and filed Federal and State tax returns for the period concerned (see Exhibits "C" and "D"). The business continued until September 28, 1953, when a petition for reorganization of the Corporation was filed in the United States District Court for the Southern District of New York. In the proceedings for the reorganization, assigned case number 896691, Debtor remained in possession.

Area

Debtor owns approximately 32 acres of ground, comprising rental areas, which includes a race track, grounds and buildings.

Buildings A to E were on the property prior to the fire, August 28, 1956. Building A approximately 9000 sq. ft., building C approximately 7776 sq. ft., and building E (known as the grandstand building, inasmuch as a grandstand is erected over it) approximately 7488 sq. ft., were on the grounds at the time of original purchase on April 7,

1951. Building B, approximately 4000 sq. ft. was completed on January 1, 1952, connecting buildings A and C. In May 1955, building D, approximately 21000 sq. ft., was erected with the approval of the Court, connecting buildings C and E, thereby making the Market Buildings one complete area of approximately 49,264 sq. ft. The proposed floor space to be rebuilt is approximately 70,000 sq. ft., which together with the remaining grandstand building, would give a total floor space of 77,488 sq. feet for renting. In addition, while the Nazareth Agricultural Fair was in existence, it erected two cinder block sheds on the hill area of the property. Said organization was dispossessed for non-payment of rent in 1956, with the buildings reverting to the Debtor. They have not, subsequently, been rented.

Addenda

Debtor is not a real estate corporation as such, but is also responsible for the development and promotion of its market sales. Debtor began operations in August of 1951 with unconnected Buildings, at a cost of $70453.50 and [fol. 10574] covering approximately 34264 sq. ft. It grew until it encompassed in Buildings, all connected, approximately 24264 sq. ft., almost doubling in size, with the cost of Buildings increasing to $106815.57 as of June 30, 1956. During tais same period, Improvements were made to the grounds from $12556.14 to $41254.82.

A glance at Schedule 1, Cash Income by months, indicates this transition most clearly. Schedule 2, showing the average Annual Rentals receivable before the fire of $93648.60 shows the gross income that approximately would now have been Debtor's. Schedule 1 further shows that this development of income arose through evening the collection by months. This goal was attained by attaining year round attendance by the merchants. It will be noted that until the last building, referred to as Building D, which was erected during the period of reorganization with the approval of the Court, that it was not possible to attain the level of occupancy in the months from November to March that prevailed throughout the year. The extensive advertising campaign in the fiscal year ending June 30, 1956 plus

the uninterrupted shopping area provided the year round merchant rentals. It must also be noted that in addition to paying increased rentals, the merchants had begun to underwrite the advertising campaign from their funds, thus enabling the Debtor to revert to its normal advertising program.

Prospects

The Debtor, though losing Buildings A to D in the fire was covered by insurance (see Schedule 3). Rental insurance will provide the Debtor with its average income until it is rebuilt. Little, however, will be collectable from the source, if rebuilding is unduly deferred or cancelled. With the proposed floor space to be rebuilt giving a total rental area of approximately 77488 sq. ft., the average annual rentals should at least produce one quarter to one third additional rental income. Such increase will be most profitable in that additional annual expenditures to maintain the operations of the Debtor will be at a minimum.

GILBERT SUNSHINE
Certified Public Accountant

Note: These Comments are subject to the comments in Letter of Transmittal which is a part of this report.

[10575]

SAUL, GENERAL: EXAMINER'S EXHIBIT CA

(S.M. 9638, 5/7/59; MLR Letter to Sugarman, J., 5/29/59)

AGREEMENT OF THE STOCKHOLDERS

of

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

AGREEMENT made as of December 1st, 1957, by and between the undersigned who are all stockholders of NAZARETH FAIR GROUNDS & FARMERS MARKET, INC. (herein called the "Corporation");

1. Each of the parties agrees that upon receipt of a bona fide offer to purchase all or any part of the stock held by them, which is intended to be accepted, or before entering into any contract for the sale thereof, he or she (as the case may be) must first offer the same for sale to the remaining parties hereto.

2. The offer to the remaining parties shall be made to them by registered mail, c/o Arnold A. Weinstein, 225 Broadway, New York City and on the same terms and conditions as the offer received or the proposed contract of sale and shall be accompanied by a copy of the offer or proposed contract. The name and address of the proposed purchaser shall also be stated.

3. The remaining parties shall have the option to purchase such stock as is intended or proposed to be sold in the proportion to which their stock bears to the total number of shares held by the remaining parties within Thirty (30) days from the date of receipt by them of the offer to sell. Acceptance of the offer shall be by registered mail and shall fix a closing date and place not later than Ten (10) days thereafter. Should any of the remaining stockholders decline to exercise his option, the remainder shall succeed to such option in the foregoing proportion.

[fol. 10576] 4. Should there be no exercise of the foregoing option, the stock of the party making the offer to the remaining parties shall be free of all restrictions on the sale thereof. There shall be no restriction in the event all of the offered shares are not purchased.

5. This agreement shall expire on December 1st, 1959, and shall not apply to transfers to a member of the immediate family of a party who takes subject to this agreement.

IN WITNESS WHEREOF, the parties have executed this agreement as of the date first above written.

Name	*Address*
Arnold A. Weinstein	225 Broadway, New York City
Jerome Fried	Eichlin Rd. & Haupt St. Easton, Pa.
Aaron Fried, per Jerome Fried	2766 University Ave. Bronx, N.Y.C.
Harry Forman	49 W. 32nd St. N.Y.1
Louis P. Como	1725 York Ave. N.Y.28
Frank Como LC	1725 York Ave. N.Y.28
Patsy Como LC	1725 York Ave. N.Y.28
Cydney Grossman	41—5th Ave. N.Y.C.
George Bond per Cydney Grossman	41—5th Ave. N.Y.C.
Robert A. Noira, by N. Kohn	10 West 65 St. N.Y.C.
H. Lawrence Lamphaimer	20 Fara Drive, Stamford, Conn.
Barry Clark	315 E. 88th St. N.Y.C.
Lazar Karapontso	160 W. 73 St. N.Y.C.
Dorothy Holober Clark	315 E. 88 St. N.Y.C.

Saul, General: Examiner's Exhibit G
(Closing Statement)

COMMONWEALTH TITLE COMPANY OF PHILADELPHIA

1510 WALNUT STREET
PHILADELPHIA 2

No. X-141889

4/17/51

Grantor Nazareth Fairgrounds Inc

Grantee Richard Realty Company

Premises Nazareth - Fairgrounds Pa

		Dr.		
Consideration	subject to mtge 55M	57500 00		
Taxes of Current Year				
Water Rent	"			
House Rent				
Acknowledgment of Deed		50		
Fire Insurance	P 61575 Mutual Fire	34 33		
	A 61708 Corona Mutual	11 45	57546	28
		Cr.		
Paid on Account		5000 00		
Taxes of Current Year	1530 - 3 mo 17 days	45 48		
Water Rent				
Mortgage Principal	2nd mtge	10000 00		
Interest on Mortgage	8500 - 1%/50 To 4/17/51	263 50		
House Rent			15308	98
		Balance Due Grantor	42237	30

COPY

SETTLEMENT WITH GRANTOR

$42237.30

Mortgage [redacted]

SETTLEMENT WITH GRANTEE

Fund Due Grantor $42237 30

Realty 6
Survey 52 00
Recordings 4 50 56 50

Balance Due Grantor 42237 30

SETTLEMENT WITH GRANTOR

$42237.30

[redacted]

Taxes (Current)

Taxes (Del.)

Water Rent (Current)

Water Rents (Del.)

Stamps 63 25

Recording

Affidavit & Acknowledgment 1 00 2076438

Balance Payable to Grantor $ 42172 92

SETTLEMENT WITH GRANTEE

Fund Due Grantor $42237 30

Realty Co

Survey 52 00

Recording 4 50 56 50

David Stark Coll

1951 Taxes 39 69

Stamps

Examination Fee	85	-	
Premium	287	50	
Settlement Fee	5	-	
Recording and Services — Deed	4	50	
Recording and Services — Mortgage	7	50	
Affidavit & Ack.	10	00	399 50

Fund Necessary to Complete Settlement $42 732 99

Deposited By $

Total

[fol. 10577]

COPY

The above settlement examined and approved, in consideration of which Commonwealth Title Company of Philadelphia is directed and authorized to make distribution and payments in accordance herewith if all its requirements in connection with the settlement and its title insurance have been fulfilled.

Approved

Grantors

Address

Approved

Grantees

Address

531

[fol. 10578]

SAUL, GENERAL: EXAMINER'S EXHIBIT I

(Debtor's Minute Book)

NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC.

MINUTES OF FIRST MEETING OF THE BOARD OF DIRECTORS

The first meeting of the Board of Directors was held at Room 603, 1616 Walnut Street, Philadelphia 3, Pennsylvania, on the ninth day of August 1951 at ten o'clock A.M.

* * * * * * *

[fol. 10581] WHEREAS, it was the intention of the incorporators to purchase, take over and carry on the business known as The Nazareth Farmers' Market at Nazareth, Pennsylvania, now being operated by Milton R. Zoloth and Morris Soble and

WHEREAS, Mr. Zoloth, on behalf of the partnership, offered to sell the said business as a going concern to this corporation in consideration of the issuance to them of twenty shares of full paid and non-assessable shares of this corporation.

WHEREAS, in the judgment of this Board of Directors, after careful examination and fair appraisement, this Board is unanimously convinced that the said property is necessary and advantageous for the business of this corporation and the fair value thereof is the consideration mentioned in the said offer.

NOW THEREFORE, Be It Resolved:

That this Board accept the offer of Milton R. Zoloth and Morris Soble and purchase from them the business and property consisting of thirty-two acres of ground situated on the southwest corner of the intersection of Pennsylvania Routes Nos. 12 and 45 in Lower Nazareth Township, Pennsylvania, together with all of the assets of the said business as set forth in a copy of a balance sheet submitted by the said Milton R. Zoloth and Morris Soble, dated August 8, 1951 as follows:

[fol. 10582]

ASSETS			
Cash		$ 1,217.17	
Deposit		50.00	
Loans Receivable		3,615.52	
Land and Buildings	$66,456.50		
Improvements	9,794.64		
	76,251.14		
Less—Reserve for Depreciation	1,023.75		
NET BOOK VALUE		75,227.39	
Prepaid Insurance		1,284.00	
TOTAL ASSETS			$81,394.08

LIABILITIES AND NET WORTH

LIABILITIES		
Loans Payable	$57,135.92	
First Mortgage Payable	8,500.00	
Second Mortgage Payable	9,500.00	
Accrued Taxes and Expenses	4,758.16	
TOTAL LIABILITIES		$79,894.08
NET WORTH		1,500.00
TOTAL LIABILITIES AND NET WORTH		$81,394.08

FURTHER RESOLVED, That this corporation assumes the payment of all of the obligations of the partnership as set forth above and that the President and Secretary of this corporation are authorized and directed to issue and deliver in accordance with the terms of the said offer, certificates for twenty full paid and non-assessable shares of this corporation to the said Milton R. Zoloth and Morris Soble.

Upon motion, duly made, seconded and carried, it was

RESOLVED, That the proper officers of the corporation be and they hereby are authorized and directed in behalf of the corporation, and under its corporate seal, to make and file such certificate, report or other instrument as may

be required by law to be filed in any state, territory, or [fol. 10583] dependency of the United States, or in any foreign country, in which said officers shall find it necessary or expedient to file the same to authorize the corporation to transact business in such state, territory, dependency or foreign country.

The officers were instructed to register this corporation with the Department of Revenue at Harrisburg, Pa., as required by law, and to properly execute and file the necessary initial Bonus Report with the Department of State at Harrisburg, Pennsylvania.

Upon motion, duly made, seconded and carried, it was

RESOLVED, That the Treasurer be and he is hereby authorized to pay all fees and expenses incident to and necessary for the organization of the corporation.

There being no further business, the meeting upon motion adjourned.

/s/ Paul Laury
Secretary

[fol. 10584]

SAUL, GENERAL: EXAMINER'S EXHIBIT I

(Debtor's Minute Book)

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

WAIVER OF NOTICE OF SPECIAL JOINT MEETING OF OFFICERS AND DIRECTORS.

We, the undersigned, being all the officers and directors of Nazareth Fair Grounds & Farmers Market, Inc., do hereby waive notice of the time, place and purpose of a special joint meeting of the officers and directors of the said coroporation.

We do hereby fix July 2nd, 1952 at 2 P. M. as the time and the Nazareth Fair Grounds, Nazareth, Pennsylvania as the place of the said meeting.

Dated—July 2nd, 1953

/s/ JOHN MALAKOFF
President & Director

/s/ JEROME FRIED
Secretary-Treasurer & Director

/s/ RICHARD S. HULL
Director

[fol. 10585]

SAUL, GENERAL: EXAMINER'S EXHIBIT I

(Debtor's Minute Book)

MINUTES OF A SPECIAL JOINT MEETING OF THE BOARD OF DIRECTORS AND OFFICERS OF NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

A special joint meeting of the Board of Directors and Officers of Nazareth Fair Grounds & Farmers Market, Inc., was held at the Nazareth Fair Grounds, Nazareth, Pennsylvania on July 2nd, 1952 at 2 P. M. All of the directors,

consisting of John Malakoff, Jerome Fried and Richard S. Hull, were present. All of the officers, consisting of John Malakoff, President and Jerome Fried, Secretary-Treasurer, were present.

The meeting was called to order by the president and the minutes were recorded by the secretary. The president advised the meeting that there are approximately $66,092.92 in loans, payable to John Malakoff according to the books and records of the corporation and he further advised the meeting that in accordance with the statement set up in the minutes of August 9th, 1951, the net worth of the corporation was $1500.00. Since twenty shares of stock had been issued, the value of the stock was $75.00 per share. He further advised that the said John Malakoff was willing to liquidate $13,500.00 of the obligation due him by accepting one hundred eighty shares of stock at the same $75.00 per share. After considerable discussion, it was, on motion made seconded and unanimously carried,

1 of 2

[fol. 10586] RESOLVED, that the Nazareth Fair Grounds & Farmers Market, Inc., issued to John Malakoff or his designee, one hundred eighty shares of stock, in reduction of the sum of $13,500.00 against the amount due the said John Malakoff, and, that the officers of the corporation be, and they are hereby authorized and directed to issue said shares of stock to the said John Malakoff, or to his designee, in such denomination and at such times as he may request.

There being no further business, the meeting was, on motion adjourned.

/s/ Jerome Fried
Secretary.

Dated—July 2nd, 1953

I, the undersigned, John Malakoff, do hereby accept the terms of the resolution herein referred to and will, from time to time direct the corporation to issue the said one hundred eighty shares of stock in such denominations as I may advise them.

/s/ John Malakoff

July 2nd, 1952

2 of 2

Saul, General: Examiner's Exhibit J
(Ledger Sheet - Philadelphia Group)

[fol. 10587]

Nazareth Farmground

18 459
PHILADELPHIA LEDGER

1951					1951				
Sept 17	Cash - Clearance Bank & Tr Co	CR 30	X	50000	Sept 10	open Bank & Trust Co	CR 12	X	50000
17	Comm Title Co 6 Mo Due 4/11/51	CR 21		42 73299	13	M Sable	CR 12		40000
17	R Metzger & M Erickson	CR 21		25500	June 26	J Malakoff	CR 12		37500
19	Deposit Nazareth Bank	CR 21		100000	July 7	J Malakoff	CR 14		100000
May 3	Wm Edelman & Co grading 28799	CR 24		44487 99 685 49	Aug 16	"	CR 15		22500
7	E Malakoff Transfer Tax & Tr Co	CR 25		500000	18	" Balance	CR 15		73900
June 11	M Sable	CR 32		50173 48 25000 00	18	" 1/4 Improvements	CR 15		7500
July 17	M Zeltzer Transfer Tax & Tr Co	CR 38		52673 48 1700000	Sept 11	J Malakoff 2815.52 ~~3815.52~~	CR 25		500000
Sept 14	M Sable	CR 47		54373 48 250000	13	J Malakoff ~~3615.52~~	CR 25		500000
Oct 16	M & Co	CR 53		56873 48 1115 52	21	J Malakoff ~~16,115.52~~	CR 26		500000
19	M Sable	CR 53		57988 00 250000	Oct 16	"	CR 28		250000
24	" "	CR 53		500000	24	"	CR 29		250000
26	" "	CR 53		250000	25	"	CR 29		250000
Nov 7	" "	CR 56		67988 00 200000	29	"	CR 29		200000
8	" "	CR 57		500000	Dec 10	J Malakoff	CR 35		2553 05
15	" "	CR 64		77988 00 300000					
Dec 1	" "	CR 67		10000000 87988 00					

2146.92

M & Co - 7346 M 2
37 073 46 : M 5
1,UC 92
2.853 05 M 2 : M 5
40,000 00

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
MAY 23 1958

[fol. 10588]

Nazareth Fairgrounds

18-459 1/4BAX "EYE EASE" HAMMERMILL LEDGER

1952					1952				
Jan	1		✓	2146 92	Jan	3	J Malahoff	CR 7	2146 92
Dec	29	Penna Dept of Revenue	CP 66	661 86	Feb	15	J Malahoff & Nazareth	CR 7	2000 00
	29	M Labella	CP 66	1000 00	Sept	22	Caledonia Ins Co	CR 33	2586 20
				1661 86		22	Ins Co N A	CR 33	1844 26
Nov	5	Caledonia Ins Co Adjustment	CP 68	15 83		22	Hanover Fire Ins	CR 33	1539 00
	5	Hanover Fire Ins Co	CP 68	11 93					7969 46
	5	Ins Co N A	CP 68	14 81	Oct	27	Mass Fire	CR 38	1953 77
				17044 43		27	Royal Ins	CR 38	1740 42
						27	Aetna Ins Co	CR 38	1562 34
						27	Nat Union Fire ~~13,547.86~~	CR 38	1953 77
							13,475.33		15179 46

[fol. 10589]

SAUL, GENERAL: DEBTOR'S EXHIBIT F

Title Inc.—Comm Title 4/17/51—# X 141889

AGREEMENT made this 17th day of October, A. D. 1951,

WITNESSETH, That, Milton R. Zoloth and Morris Soble, hereinafter called the Sellers, agree to sell their Twenty (20) ~~Fifteen (15)~~ shares of NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC., stock to

hereinafter called the Buyer, who agrees to buy these shares for the sum of Thirty-Two Thousand, Eight Hundred fifty-three Dollars and eight cents ($32,853.08) payable as follows: Two Thousand, eight Hundred fifty-three Dollars and eight cents ($2,853.08) payable upon the signing of this agreement, and the balance of Thirty Thousand Dollars ($30,000.00) in ten (10) equal monthly installments of Three Thousand Dollars ($3,000.00) each, the first installment of which is due on November 17th, 1951 and monthly thereafter. The aforementioned ~~fifteen (15)~~ Twenty (20) shares constitute one hundred percent (100%) of all issued stock of the Nazareth Fair Grounds & Farmers' Market, Inc.

Title of stock to pass to Buyer immediately upon payment of aforementioned sum of Two Thousand eight hundred fifty-three Dollars and eight cents ($2,853.08). Said stock to be held in escrow by Edward Malakoff until full amount of purchase price is paid to the Sellers. Buyer is to have full rights to any and all dividends in this stock but Sellers retain voting rights of stock until such time as full payments shall have been made by Buyer.

Should Buyer fail to make payments as hereinabove provided, the sum or sums paid on account are to be retained by Sellers, either on account of purchase money, or as compensation for the damages and expenses they have been put to in this behalf, as the Sellers shall elect, and in the latter case this contract shall become null and void and all copies to be returned to Sellers for cancellation.

[fol. 10590] This Agreement to extend to and be binding upon the heirs, executors, administrator and assigns of the parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

.....(SEAL)

/s/ JOHN MALAKOFF (SEAL)

.....(SEAL)

Sealed and delivered
in the presence of:

.....

.....

We hereby acknowledge the receipt of Two Thousand, Eight Hundred Fifty-three Dollars and eight cents ($2,853.08) from the buyer.

.....

.....

3700-3704 Angelina Ave

Saul, General: Debtor's Exhibit K
(Malakoff record book)

4/13/51

Contract dated 13th - at Bernard S. White atty
690 Anderson Ave - Cliffside Park, N.J.
Cliffside 6-11-21 - Broker Von Schrader & Ed Stanfield
Purchase Price 145.000
1st mtge 95,000
2nd " 15.000
Cash 35.000
On Contract 7,500 (Given by R. Hall)
Title July 2, 1951 as of June 1st

		Ret. Deposit 4/19	Profit	
B. Margolis	2/6	2500	600 =	4/2
F. Kaffenell	1/6	1250	300	4/3
Chas. Kantor	1/6	1250	300	4/4
Stanberg	2/6	1250	300 =	4/6
Feitelberg	1/6	1250	300	4/7

Re Sale:
Sold to M. Manuel - 7500
Broker Stanfield & Von Schrader 2500 =
Atty fees 200 =

Allowance M. M. - 1000 = plus 200 = fees
Total Profit for syndicate 1800 =

[fol. 10591]

10591

	20		200
	22		500
	10	1500	
	16	1000	
	22	1000	
	28	1000	
OCT	14	2000	
	14	1000	
	24	1100	
	31		2100
	10		3000
NOV	17		1500
	18		525
	25		1000
	15		775
	13	1300	
	10	1500	
	V	1000	
DEC	1		2500
	15		204650
	22		1700
	24		400
	25		200
	26		1200
	27		4200
	27		200
	30		100
	30		4000
	30		400
	31		200
	11/28	1500	
	11/28	1000	
	26	2500	
	12	204650	
	18	1700	
	22	3000	
	22	2500	
	31	100	
	31	100	
FORWARD		3040450	2404650

142 N. 103

Contract 4/20 - Jacob Arndt - atty

Price 5,000 Cash over mtge -

4/20 Chas. Kanter -

~~Subscribed 500 Preferred~~

M. Kapp. Pref	100		
Kapp	100	Pd - May 1950 - Cash -	
Chas Kanter	100	Pd " 1950 -	
abstract - atty	100	Pd " 1950 -	
atty -	100	Pd -	
Sec Co -	500		

10592

[fol. 10592]

Nazareth

1/3 Int

1/4 Interest

Repairs –
5/18 Grading 2795 10
200 Sub Ba 788
30 Tops – 45
10 Alle 25
Labor – Painting
Electric wiring

10593

[fol. 10593]

[redacted]

L - Court
D. . . Y.
T. . . 1958

J. MALAKOFF
EXCHANGE A/C
1952

		DR	CR
JULY	3	500	
	16	1000	
	23	63	
	23	1000	
	23	1000	
AUG	28		1000
SEPT	10		500
	17		800
	20		200
	22		500
	10	1500	
	16	1000	
	22	1000	
	28	1000	
OCT	14	2000	
	14	1000	
	24	1100	
	31		2100
	10		3000
NOV	17		1500
	18		525
	25		1000
	15		775
	13	1300	
	10	1500	
	4	1000	

J MALAKOFF
EXCHANGE A/C
1953

			DR	CR
BALANCE FORWARD			30409 50	39456 50
JAN 1953	4			3000
	4			500
	16			2500
	23			3000
		dates unknown	200	
			500	
			3000	
		5	100	
		7	100	
		7	100	
FEB	3			300
		1	100	
MAR		1	100	
	17			300
	5		300	
	4			700
APRIL		1	100	
MAY		27	3525	
		1	100	
JUNE		1	100	
	3	3	300	
		17	500	
		11	3323	
			4162	
			43444 75	39456 50
BALANCE			3987 25	

[fol. 10595]

[fol. 10596]

SAUL, GENERAL: DEBTOR'S EXHIBIT O

BENJAMIN MARGOLIS
ATTORNEY AT LAW
271 NORTH AVENUE
NEW ROCHELLE, N. Y.
NEW ROCHELLE 2-3100

May 25, 1953

Richard S. Hull, Esq.
393 Seventh Avenue
New York, N. Y.

Re: Nazareth Fair Grounds & Farmers Market Inc.

Dear Sir:

In going over the books and records of the corporation it appears among other things: 1. That no meeting of the stockholders or directors were held. 2. That stock of the corporation was issued without the money being put in the corporate treasury. 3. That the proceeds of checks given for windstorm losses in July, 1952 were not used in accordance with law. I refer in particular to the settlement made by Young Adjustment Co. with Murray Realty Co. in July, 1952 or thereabouts. 4. That more than the 200 shares of authorized stock were issued. 5. That on April 17, 1953 or thereabouts you prepared papers for an agreement between Malakoff and Charles Kanter whereby you consented to have issued shares of stock of Nazareth Corp. in exchange of stock of Ambassador Estates Inc. Twenty shares of stock of Nazareth Corp. were issued for a sum of $12,000. and it also appears that Kanter also received dividends from Malakoff on said shares.

There are numerous other items that must be gone into and questions answered without any delay.

Demand is hereby made upon you as attorney and Director of the Corporation to send me full details as to the items herein above enumerated. It appears evident that

you are or should be familiar with all the facts especially since the corporate books were always in your possession and were released only several days ago for my inspection.

Very truly yours,

/s/ BENJAMIN MARGOLIS
Benjamin Margolis

CC John Malakoff
280 Madison Ave.
New York, N. Y.

[fol. 19597]

SAUL, GENERAL: DEBTOR'S EXHIBIT P

June 2, 1953

Richard S. Hull, Esq.
393 Seventh Ave.
New York, N. Y.

Re: Nazareth Fair Grounds & Farmers' Market Inc.

Dear Sir:

Regarding the outstanding certificates of stock issued by John, I am enclosing herewith the list as taken from the stock book on Monday June 1st. 1953. The notations that appear on the stubs are also set forth on the list.

According to the records there are outstanding at this time a total number of 307 shares. Please be good enough to check this list and let me hear from you within the next few days as to whether there are any errors; also the number of shares that John has been able to get back up to the present time. No doubt, it would also be advisable to send me a revised list so that same is in my possession no later than Saturday morning so that the list can be used at the meeting that has been called for Monday, June 8th. 1953 at 5 P. M.

The stock transfer book has been left at John's office, therefore I would suggest that the names and addresses of

every stockholder together with the required information as to the date when the stocks were issued, whether it was an original issue or not, be entered in the book in compliance with law.

In going over the minute book I note that you wrote up the minutes of a so-called meeting that was held on July 2nd. 1952 by the Directors and Officers of Nazareth Fair Grounds & Farmers' Market Inc. also a meeting alleged to have been held on October 22nd. 1952, which latter meeting mentions about the assignment by the corporation to John Malakoff of a certain sum of $11,811.78. The two meetings mentioned herein were written up by you within the last few days. The fact remains, from the conversation had with Mr. Fried, he was not present at any such meetings and that the only meetings he attended were those originally set forth in the minute book. The fact that minutes are prepared at this late date in order to cover up certain items or have self-service is something that may not be acceptable to the present stockholders.

[fol. 10598] It is most urgent that you send me the information requested herein in writing.

It is my purpose to work along in a friendly spirit and cooperate provided the same spirit and cooperation be shown by you.

Very truly yours,

BENJAMIN MARGOLIS

H.
ENCL.

[fol. 10599]

SAUL, GENERAL: DEBTOR'S EXHIBIT Q

WHEREAS, the undersigned, as President and in control of the NAZARETH FAIRGROUNDS & FARMERS MARKET, INC. caused to be issued certain stock as security for personal loans made by various individuals to me personally, and,

WHEREAS, as a result of giving stock as security and issuing other shares I was advised thereafter that more

than the two hundred shares of the authorized stock was issued after counting all the shares outstanding including those that I gave as security for personal loans, and,

WHEREAS, a committee was formed to call a meeting of the stockholders to look into the affairs of the said corporation, and,

WHEREAS, I resigned as President and Director of the said corporation acting upon the request of the stockholders committee, and,

WHEREAS, there are certain obligations due me from the NAZARETH FAIRGROUNDS & FARMERS MARKET, INC. amounting to approximately $63,000. or thereabouts according to my personal records, and,

WHEREAS, it is my intention and purpose to satisfy the stockholders so as to not jeopardize their interests and rights if any,

NOW, therefore, in consideration of One Dollar and other good and valuable consideration to me in hand paid by the stockholders committee, receipt whereof is hereby acknowledged,

THE UNDERSIGNED, hereby agrees as follows:

1. That I hereby release and cancel any and all claims that I have against the NAZARETH FAIRGROUNDS & FARMERS MARKET, INC. by virtue of my services rendered in the amount of $63,000. or thereabouts, it being understood, however, that after the report of the stockholders committee be completed and it be determined that I am entitled to all or part of the sum hereinabove mentioned, that said sum or sums will be returned to me or stock of the corporation issued therefor.

2. It is further agreed that I will be given a copy of the report or reports that will be made by the firm of certified accountants in Pennsylvania, and the report of the attorney's in Pennsylvania, and also be apprised of any and all further reports that may come into the possession of the

stockholders committee or of the new Board of Directors that were recently elected.

Dated, New York, July 2, 1953.

/s/ JOHN MALAKOFF

[fol. 10600]

J. FRIED CREDITOR: EXAMINER'S EXHIBIT I

ASSIGNMENT OF LEASE

KNOW ALL MEN BY THESE PRESENTS, that I, JOSEPH SHERMAN, of the Borough of Nazareth, County of Northampton and State of Pennsylvania, for and in consideration of One Dollar ($1.00) to me duly paid by NAZARETH ENTERPRISES, INC., of the Township of Lower Nazareth, County and State aforesaid, have sold, and do hereby assign, transfer and set over unto Nazareth Enterprises, Inc., a certain Lease, dated the 11th day of August, 1953, made by Nazareth Fairgrounds and Farmers Market, Inc., to Joseph Sherman of premises located in Lower Nazareth Township, County and State aforesaid. To have and to hold the same unto Nazareth Enterprises, Inc., and its successors from the 28th day of April, 1953, for and during all the rest and remainder yet to come of, and in the term of years mentioned in the said Lease together with any renewals thereof, subject to the rents, covenants and conditions contained in said lease.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 28th day of April, 1953.

/s/ JOSEPH SHERMAN (SEAL)
Joseph Sherman

[fol. 10601]

J. Fried Creditor: Examiner's Exhibit K

January 24, 1955.

Re: Nazareth Fair Grounds
& Farmers Market, Inc.

Nazareth Enterprises, Inc.
Fair Grounds
Nazareth, Penn.

Gentlemen:

You have been notified and are aware that Nazareth Fair Grounds & Farmers Market, Inc. is a bankrupt under Chapter X and duly filed a Chapter X proceeding which was approved in the United States District Court for the Southern District of New York.

You were also advised previously, orally, that the lease executed by Nazareth Fair Grounds & Farmers Market, Inc., dated the 18th day of August, 1952 to Joseph Sherman and which was thereafter assigned to yourself on April 28, 1953, was opposed by the present Debtor and Debtor in Possession on various grounds. Substantially, same are as follows:

1. That Jerome Fried is an officer of Nazareth Fair Grounds & Farmers Market, Inc., originally executed the Sherman lease on August 18, 1952 and while an officer thereof, took an assignment thereof in the name of Nazareth Enterprises, Inc., during which time the said Jerome Fried was an officer of both Nazareth Fair Grounds and Farmers Market, Inc. and Nazareth Enterprises, Inc.

2. That said lease is burdensome and oppressive to the Debtor in Possession by virtue of the terms thereof.

3. That the Debtor in Possession rejects said lease, pursuant to the provisions of the Chapter X of the Bankruptcy Act and the Bankruptcy acts relating thereto.

Very truly yours,

Alex L. Rosen

ALR:C

[fol. 10602]

J. FRIED, CREDITOR: EXTRACTS FROM DEBTOR'S EXHIBIT AI

READ THE CONDITIONS OF THIS LEASE

THIS LEASE, Made the 6th day of January A. D. 1958 Between Nazareth Fairgrounds & Farmers Market, Inc., Debtor hereinafter designated lessor, party of the First Part, and NAZARETH ENTERPRISES, INC., a Pennsylvania corporation hereinafter designated lessee, party of the Second Part.

1. WITNESSETH, that lessor doth hereby lease unto lessee all those certain premises, with the appurtenances, situated at the intersection of Routes 12 and 45 known as Nazareth Fairgrounds, Nazareth, Pennsylvania, and described as follows, viz: the race track, grandstand, parking area and the buildings and installations located thereon for the purpose of preparing and furnishing food and refreshments and the furnishing of toilet facilities to race patrons

To be used for the conduct of automobile races and public events and entertainment on Sundays and Fridays and on Decoration Day, Independence Day and Labor Day, or the nights preceding said Holidays, access to the premises be-
during all times
ing granted to the Lessee for the purpose of making repairs, improvements and making arrangements for the conduct of its business.

2. TO HAVE AND TO HOLD the same unto lessee for the term commencing the 1st day of March 1958, and ending the 1st day of November 1963

3. IN CONSIDERATION whereof lessee agrees to pay to lessor a sum equal to Fifteen Per Cent (15%) of the
spectator admission
Lessee's gross ~~receipts~~ from the use of the premises within two (2) weeks from the conduct of any race or event on the demised premises for which an admission charge is made by the Lessee.

4. Lessee may renew this lease on the same terms and conditions for a further period of Five (5) years by giving to the Lessor at least 90 days notice thereof by registered mail.

4A. The Lessor may cancel the renewed portion of the term in the event of a sale of all of the land and buildings of which the demised premises form a part by giving 30 days notice thereof to the Lessee by registered mail. Such cancellation shall be effective as of the close of the next succeeding automobile racing season which, it is understood, extends from April 1st to November 1st in each year. In the event of cancellation by the Lessor, the Lessee shall be entitled to receive from the Lessor on the effective date thereof a sum equal to the cost of all improvements made to the demised premises by the Lessee during the term hereof less depreciation thereon, provided however, such improvement were originally made with the written consent of the Lessor.

4B. Lessee shall maintain, for itself and Lessor, insurance policies insuring both parties against liability for accidents causing personal injuries or property damage as a consequence of the operation of Lessee's business with limits of at least $100,000 to $300,000.

(See attached Rider)

RIDER

4C. The Lessor being in reorganization under the Bankruptcy Act, this lease shall not become effective until the same shall have been improved by the United States District Court, Southern District of New York, or any duly authorized or competent officer thereof. Lessor agrees to apply for such approval without undue delay.

4D. Upon approval of this lease as aforesaid, all prior leases or agreements between the parties affecting the demised premises shall become null and void.

* * * * * * *

[fol. 10603]

NAZARETH FAIRGROUNDS & FARMERS MARKET, INC., Debtor.

By: .....(SEAL)

NAZARETH ENTERPRISES, INC. (SEAL)

By: /s/ JEROME FRIED, Pres. (SEAL)

[fol. 10604]

J. Fried Creditor: Margolis's Exhibit C

Enterprises Lease

(held by Nazareth Enterprises, Inc., as assignee of Lessee)

This Lease, made the 18th day of August, 1953 Between Nazareth Fairgrounds and Farmers Market, Inc., hereinafter designated Lessor, party of the First Part and Joseph Sherman hereinafter designated Lessee, Party of the Second Part.

1. Witnesseth, that Lessor doth hereby lease unto Lessee all those certain premises, with the appurtenances, situated in Lower Nazareth Township, County of Northampton and State of Pennsylvania, known as Nazareth Fairgrounds and Farmers Market, Inc., to be use in the sponsorship of carnivals, rodeos, races, all kinds of sporting events and entertainment features.

2. To have and to hold the same unto Lessee for the term commencing the 19th day of August, 1952 and ending the 30th day of November, 1962.

[fol. 10605] 3. In consideration whereof Lessee agrees to pay to Lessor the sum of Twelve (12%) percent of the gross admissions in the features set forth in Paragraph 1. However, on those days that the Lessee operates the food concessions for the events set forth in Paragraph 1, he shall pay to Lessor Fifteen (15%) percent of the gross admissions.

4. A lawful continuance of the tenancy beyond said term shall be deemed a renewal therefor for the further term of ten (10) years to end at the expiration thereof without further notice. And every further lawful continuance shall be deemed a further renewal for a like term, to end in like manner. And every such renewal shall be subject to the provisions of this lease.

5. Lessee will keep the premises in as good repair and condition as at the commencement of this Lease; and at the

end of said term or any renewal the Lessee will deliver up said premises without further notice in as good repair and condition as at the commencement hereof, ordinary wear and tear and unavoidable damage by the elements excepted.

6. Lessor agrees to make all major repairs.

7. Lessee agrees to keep premises in a clean and sanitary condition.

8. Lessee shall comply with all rules and regulations of State and Local Boards of Health.

9. Lessee agrees that no unlawful business shall be carried on upon said premises.

10. Lessee agrees to carry spectators' liability insurance for all events promoted by him.

11. Lessee may assign this lease under the same terms and conditions set forth herein without Lessor's consent.

[fol. 10606] 12. The heirs, executors, administrators and successors of said parties respectively are included herein as if in each instance specifically mentioned.

NAZARETH FAIRGROUNDS AND FARMERS MARKET, INC.

By /s/ JEROME FRIED (SEAL)
General Manager

/s/ JOSEPH SHERMAN (SEAL)
Joseph Sherman

Signed and delivered the day and year first written in the presence of:

/s/ LORENA UHLER

[fol. 10607]

KATZENELL EXHIBIT 6

26

No. ..... NEW YORK Sept. 4 1954

1-8
210

THE NATIONAL CITY BANK OF NEW YORK
CITY BANK FARMERS BRANCH
Twenty-two William Street at Exchange Place
New York, N. Y.

PAY TO THE ORDER OF John Malakoff, Agt $2000.00

Two Thousand 00/100 DOLLARS

/s/ KATZENELL

Frederick Katzenell
650 Fifth Avenue
New York 19, N. Y.

[fol. 10608]

(Endorsements on back)

Re—Nazareth Inc.
Total 30000

John Malakoff
~~Hotel Wales~~
Loan

John Malakoff, Agt

(Stamp)

Pay to the Order of any
Bank, Banker, Trust Company
or through the
New York Clearing House

Sep 6 '51 1109

Prior Endorsements Guaranteed

Corn Exchange Bank Trust Co.
1-45 of New York 1-45

KATZENELL EXHIBIT 7

John Malakoff — 1950

Date		Amt		Date	received		Cap. Int	Gain	
Feb 2	John Malakoff Bond	1000.00		April 18	450.		1000.	450.00	77th Stock
" 2	" " ✓	2750.00		" 21	2375.		625.	750.00	
" 23	" " (B. Mangolen) ✓	1125.00		May 5	875.		875.00		no profit
Mar 3	" " ✓	175.00		Jul 15	3250.		2750.00	500.	
April 5	" " ✓	937.50	937.50	Aug 18	343.00			343.00	
" 14	" " ✓	625.00		Sept 18	1300.		1300.		no profit
" 20	" " (M. Steinberg) ✓	875.00		Oct 13	2700.00		2700.		no profit
May 11	" " ✓	1875.00		Nov 9	1000.		875.	125.00	
" 12	" " (Miss Killen) ✓	8000.00	+ 6000 -	" 21	2250.		1875.	375.00	
Jun 29	J.K. (Mangolen) ✓	2500.00	2500 ?	Dec 7	Killen	2100	Mer 2000.	100.00	ab. Check
Jul 7	John Malakoff ✓	23.00		Dec 15				153.00	
Aug 18	" " ✓	2700.00						2643.00	Profit
Sept 19	" " ✓	150.00							
" 19	" " Carl	2000.00	2000 -						
Dec 8	" "	5000.00	5000 -						
Dec 14	" " (S Rosenwald)	2825.00	2825 -						
" 20 ✓	" " (Steinberg)	1000.00	1000 -						
		34137.50							
			19350.00						
			937.50						
	+ to be applied 1951		20287.50						

6/29 Flora Kroger — Total 3143.00 Profit

(KATZENELL - 5)

1951 = John Malakoff

	balance carried (1950)		20,287.50	
Jan 10	J. M. (Mangolen)		2500.00	✓
" 24	" "	4250 + 750	5000.00	
Feb 7	" "		2300.00	
" 9	" "		2000.00	
April 4	" " (Campbell)		2100.00	✓
" 6	" "		416.00	✓
" 17	" " Morgenthau		1250.00	✓
May 10	" "		2500.00	
" 15	" "		2500.00	
" 17	" " (Helen) Loan		5000.00	
" 23	" "		250.00	
" 23	" "		1750.00	
Jun 1	" " (Steinberg)		1666.66	✓
" 6	" "	20 BE's	500.00	✓
" 6	" " Chestnut Pl. Co.		500.00	✓
" 8	" "		645.00	
" 12	" " (Campbell)		1500.00	
" 19	" "		1000.00	
" 19	" " cash		500.00	
" 19	" "		200.00	
July 2	" " Morgenthau		500.00	✓
" 2	" "		800.00	
" 2	" " cash		1100.00	
" 12	" "		2000.00	
" 12	" "		1150.00	✓
			40,557.66	

John Malakoff

			40,557.66	
Jul 12	J. M. (Steinberg)	39.63	500.00	
" 12	" " Morgenthau		250.00	
Aug 29	" "		1100.00	
Sept 4	" "		2000.00	
			44,407.66	
	1150 + 750 = 1900			
	40,557.66			
	Received 1951			
April 17	Cash		1300.	✓
" 26	"		1666.66	✓
" 26	"		1250.00	✓
May 5	"		1750.00	✓
Jun 18	"		300.00	
July 3	"		325.00	
" 7	Profit	150.00		
")			1660.00	
" 8	"	800.00		
"		337.50	1550.	
Sept	Cash	11.37	1348.	✓
"			1609.00	
			12,078.66	

(Received cash Sept [illegible] Profit on Sale of Bonds)

[fol. 10611]

MASUR EXHIBIT 8

JOHN MALAKOFF
REAL ESTATE
280 MADISON AVENUE—SUITE 403
NEW YORK 16, N. Y.

LEXINGTON 2-3281-2

September 11, 1951

Mr. Harold Qu. Masur
522 East 20th Street
New York City

Dear Sir:

Please be advised that I am holding in escrow the sum of Four thousand dollars which represents one-fiftieth (1/50th) ownership in the Nazareth Farmer's & Auction Market, in Nazareth, Pennsylvania.

At the present time the return on your investment is twenty per cent (20%) per annum, payable monthly. As the net income increases your return will increase proportionately.

Thank you.

Yours very truly,

/s/ JOHN MALAKOFF
John Malakoff

[fol. 10612]

T. SCHWARTZ EXHIBIT 5

JOHN MALAKOFF
REAL ESTATE
280 MADISON AVENUE—SUITE 403
NEW YORK 16, N. Y.

LEXINGTON 2-3281-2

March 20, 1953

Mr. Harold B. Schwartz
260 West End Avenue
New York City

My dear Mr. Schwartz:

Thank you very much for forwarding the check in the sum of $3,000. for three shares in the Nazareth Fair Grounds & Farmers' Market, for your sister Tess J. Schwartz.

Enclosed herewith please find stock certificate. As per your instructions, I will forward her check to you at the above address, each month.

Thanking you for the opportunity you have given me to serve you, I am,

Yours very truly,

/s/ JOHN MALAKOFF
John Malakoff

JM:eb
Enc.

[fol. 10613]

TREAT EXHIBIT 4

John Malakoff
(Letterhead)

September 11, 1951

Mr. Larry Treat
Baptist Church Rd.
Yorktown Heights, New York

Dear Sir:

This is to acknowledge receipt of your check in the sum of Two thousand dollars ($2,000) which I am holding in escrow, for 2/200ths of The Nazareth Farmer's & Auction Market, Nazareth, Pennsylvania.

The return of the above investment is now twenty per cent per annum payable monthly. As the income increases the return on your investment will increase proportionately.

Thank you.

Yours very truly,

JOHN MALAKOFF

hb

[fol. 10614]

B. CLARK EXHIBIT 5

JOHN MALAKOFF
REAL ESTATE
280 MADISON AVENUE—SUITE 403
NEW YORK 16, N. Y.

LEXINGTON 2-3281-2

August 1, 1951

Mr. Barry Clark
200 West 90th St.
New York City

Dear Sir:

Please be advised that we are holding in escrow the sum of $4,000. which you have invested with me in the deal in Nazareth, Penna., known as The Nazareth Farmer's & Auction Market. Your investment represents four (4) shares of stock in this transaction which you in turn will hold in escrow until the deal is consummated.

At the present time the return on your investment is 20% per annum payable monthly. As the amount of net income increases, your return will increase proportionately.

Thank you.

Yours very truly,

/s/ JOHN MALAKOFF
John Malakoff

[fol. 10615]

REMOVAL: WOLF'S EXHIBIT 25

To: JEROME FRIED
Haupt Street & Eichlin Road
Easton, Pa.

Receipt is acknowledged of your check for $2,200.00 to re-imburse me for the purchase for your account on March 2 and March 3, 1959 of 2 shares of stock held by Dorothy Clark, 4 shares of stock held by Barry Clark, and 2 shares of stock held by Lazar Karapontso in Nazareth Fairgrounds & Farmers Market, Inc.

I acknowledge to you that I have no interest in any of said shares and that in connection with the memoranda of March 2 and March 3, 1959 covering this purchase which were signed by the sellers, I was acting as your agent.

Delivered to you herewith are originals and original copies of the memoranda of March 2 and March 3, 1959, together with receipts for the balance of the purchase price, for filing in the Chapter 10 proceeding in the United States District Court, Southern District of New York, in the matter of Nazareth Fairgrounds & Farmers Market, Inc.

April 22nd, 1959.

/s/ ARNOLD A. WEINSTEIN

Receipt is acknowledged of the memoranda and receipts referred to above.

April 22nd, 1959

.....

[fol. 10616]

REMOVAL: WOLF'S EXHIBIT 44

Extract from Lease dated December 29, 1956, between Nazareth Fair Grounds & Farmers' Market, Inc. and J&J Foods Inc.

* * * * * * *

4. [Rent:]

(a) The sum of $6,000 per year, or 15% of the first $1,000 gross sales per week and 10% of the gross weekly sales in excess of the said first $1,000, or whichever amount is the greater, payable at the end of each and every week.

* * * * * * *

[fol. 10617] 19. The lessor agrees that it will not, during the term hereof, enter into a lease for any space at the Nazareth Fair Grounds and Farmers' Market with any person, firm or corporation for the sale and consumption on the premises of food, such as frankfurters, hamburgers, hot food platters, ice cream, desserts, non-alcoholic liquid refreshments, and kindred items, or for the sale of baked goods baked on the premises. * * *

* * * * * * *

24. This lease shall be operative on only two (2) days of each and every week during the term hereof and, until further notice, such days shall be Wednesday and Saturday.

25. This lease supersedes all previous agreements between the parties, if any, covering business locations at the

premises of the Nazareth Fair Grounds and Farmers' Market, Inc., in Nazareth, Pennsylvania.

* * * * * * *

NAZARETH FAIR GROUNDS AND FARMERS' MARKET, INC.

By /s/ ARNOLD A. WEINSTEIN
Arnold A. Weinstein

J&J FOODS, INC.

By /s/ JAMES LAGROTTE
James LaGrotte

[fol. 10618]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 403—October Term, 1960.

Argued August 17, 1961

Docket No. 26362

In the Matter

of

NAZARETH FAIRGROUNDS & FARMERS' MARKET, INC., Debtor,
ARNOLD A. WEINSTEIN and JEROME FRIED, Appellants,

—v.—

IRVING J. WOLF, ROBERT H. DAVIDSON, RICHARD S. HULL, FREDERICK KATZENELL, and NAZARETH FAIRGROUNDS & FARMERS' MARKET, INC., Appellees.

Before: MOORE, FRIENDLY and SMITH, *Circuit Judges*.

Weinstein, president of the debtor, and Fried, its general manager, appeal from so much of an order of the District Court for the Southern District of New York, Sidney Sugarman, *J.*, as prohibited Weinstein from having anything further to do with the operation of its business and discharged Fried from its employ, approved the [fol. 10619] election of one Philip as director and treasurer, prohibited disbursal of funds except on Philip's countersignature, and authorized Philip to supervise the debtor's affairs pending employment of a new general manager. Wolf and other stockholders cross-appeal from so much of the order as failed to order Weinstein and Fried to reimburse compensation and expense moneys already received. Reversed on Weinstein's and Fried's appeal save for approval of election of directors and officers; affirmed on cross-appeal.

Harold Harper (Harper & Matthews) (Harold Harper and Vincent P. Uihlein, on brief), New York, New York, for appellant Jerome Fried.

Arnold A. Weinstein, New York, New York, attorney pro se.

Alex L. Rosen, New York, New York, for Debtor.

Melvin L. Robbins, New York, New York, for appellees Wolf, Davidson, Hull and Katzenell.

OPINION—November 9, 1961

FRIENDLY, *Circuit Judge*:

The skeins from which Nazareth Fairgrounds & Farmers' Market, Inc. (hereafter Nazareth) began, and the lengthy efforts to unravel them, are recounted in my brother Moore's opinion in Nos. 27000 and 26962, this day decided. The instant appeals relate to a chapter in the Nazareth epic which, if scarcely modern, is at least more recent. The principal issue is the applicability to an officer and to a

general manager of a debtor in possession, who have been [fol. 10620] receiving compensation pursuant to §191 of the Bankruptcy Act, of Section 249, which provides:

> "Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge been otherwise acquired or transferred."

We hold the section inapplicable.

Nazareth filed its petition for reorganization under Chapter X in September, 1953. Weinstein was then its president and Fried general manager.[1] The petition prayed that the "petitioner by Arnold A. Weinstein and Jerome Fried be authorized, directed and empowered to operate the business and manage the property of your petitioner." The Court left the debtor in possession and authorized it to pay $100 a week to Fried, then described as secretary-treasurer, and nothing to Weinstein. Later the salary of Fried, then described as general manager, was increased, first to $150 and then to $200 a week, and Weinstein was awarded compensation of $50 a week. Fried, who is located [fol. 10621] at Nazareth, Pa., has been in active charge of the day-to-day operations of the debtor; Weinstein, a New York attorney, has made regular inspection trips and has

[1] Fried had previously been a director and secretary-treasurer; he resigned these offices on June 29, 1953.

passed on leases and other general policy matters. The administration has been successful, gross business having tripled from 1953 to 1959 and profits having risen from zero to $41,269.

In the course of administration a bitter contest for control arose between the stockholders who had elected Weinstein and Fried and an opposition group with which appellees are identified, known as the Rehrig group, Rehrig being a tenant of the debtor. In August, 1958, an election of directors was held, at which Weinstein, Herbert Danciger (not in either group), and Philip (Rehrig's attorney) were elected; they thereupon chose Weinstein as President, one Laupheimer as Vice President, Danciger as Secretary, and Philip as Treasurer. All this was subject to the Court's approval, as required by §191; among the welter of petitions in this proceeding was one, verified August 6, 1958, but not decided until June 14, 1960, asking for that.

In March, 1959, appellees submitted a "Petition for Termination and Recoupment of Compensation (Pursuant to §249 of the Bankruptcy Act)." The petition alleged that Weinstein's sister had purchased six shares of the debtor's stock in 1957; that in 1958 and 1959 Weinstein had purchased three shares and sold a fraction of one; that in 1959 he or persons represented by him had exercised options to purchase six shares; that Fried had bought twenty shares in 1957 of which he had sold ten back to the vendor in 1958; and that these transactions violated §249 and required the termination of appellants' compensation and the return of salary and expense moneys previously received. Weinstein filed an answering affidavit disclaiming responsibility for his sister's purchase and [fol. 10622] taking the position that his own purchases were made from stockholders who had tired of the long delays and insisted on selling to someone despite Weinstein's advice that they keep their stock—also that as to most of the stock, he was buying pursuant to options which had been arranged, in order to prevent a "raid" by Rehrig, on a basis that might result in others participating in the purchase nominally being made by him. He alleged also "that until

now I was not aware of section 249 of the Bankruptcy Act." although conceding that he was "chargeable with knowledge of its provisions." This was followed, a month later, by an order requiring appellees to show cause why their petition should not be dismissed pursuant to F. R. Civ. Proc. 12(b), with leave to appellants to answer in the event of denial.

The Court sent the matter to a referee for hearing and report; Referee Joyce recommended that the motion to dismiss be granted. When his report came before the District Judge in January, 1960, the judge filed a memorandum disapproving the Referee's ruling and setting a hearing for proof bearing on "recoupment" of past compensation and expense moneys. Such a hearing was held on June 14; at its conclusion, the judge directed from the bench that Fried be discharged as general manager, that Weinstein have nothing further to do with the operation of debtor's business, that the prayer for "recoupment" be denied, that the election of directors and officers be approved, that no funds should be disbursed save on Philip's countersignature, and that Philip should supervise the debtor's affairs pending the early appointment of a new general manager.[2] Weinstein and Fried appealed from all of the order save for the denial of "recoupment" and so much of the approval of the election as did not relate to Philip; appellees cross-appealed from the former. On motion of Weinstein and Fried, offering to serve without compensation unless the order should be reversed, this [fol. 10623] Court, on July 12, 1960, stayed so much of the order as removed them from participation in the debtor's affairs and designated Philip in their stead, with leave to the District Judge to file more detailed findings of fact and conclusions of law. These make plain that "Weinstein's and Fried's dissociation from the management" of the debtor was directed "solely because they, as fiduciaries, violated section 249 of the Bankruptcy Act by dealing in the debtor's stock." When granting the stay, we had supposed the ap-

[2] The judge had previously said orally at the hearing on June 14, 1960, that "in view of the Court's disposition of the petition for termination of compensation to Messrs. Weinstein and Fried, they can no longer function in their respective offices * * *."

peals would be heard in the fall of 1960; however, they were not argued until a special sitting on August 17, 1961. On Weinstein's and Fried's appeal we reverse, save as to the approval of the election of directors and officers; this reversal leads to affirmance on the cross-appeal.

We assume that, under the wide powers conferred by §188 of the Bankruptcy Act, the District Court might permissibly conclude that an officer or employee of a debtor who had disentitled himself to receive compensation should no longer be allowed to serve even if his service was otherwise in the best interests of the estate. The question thus is whether appellants had done that.

Section 249 finds its source in two district court decisions, *In re Paramount-Publix Corp.*, 12 F. Supp. 823 (S. D. N. Y. 1935), and *In re Republic Gas Corp.*, 35 F. Supp. 300 (S. D. N. Y. 1936), denying compensation to members of committees who had traded in securities of a debtor in reorganization under §77B of the Bankruptcy Act, 48 Stat. 912 (1934), the predecessor of Chapter X, see also *In re Mountain States Power Co.*, 118 F. 2d 405, 407 (3 Cir. 1941). Referring to these cases, the draftsmen of the Chandler Act explained that §249 was "a develop-[fol. 10624] ment of the idea that fiduciaries who trade in the securities should be penalized; that is, where they act contrary to the spirit, at least, of the common law and, in certain types of transactions, contrary to the letter of the common law" and constituted "a step toward the codification" of the rule laid down in the district court decisions, "an attempt to make it more uniform," and "broaden the base a little bit."[6] Decision whether the base was broadened so as to include an officer and a supervisory employee of a debtor in possession demands some examination of the latter concept and of the structure of the statute. Here, as in *Duparquet Huot & Moneuse Co. v. Evans*, 297 U. S. 216, 218 (1936), "there is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."

[6] 75th Cong. 1st Sess., Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 6439, pp. 183-184.

The concept of leaving of a debtor in possession, "A receivership without a receiver,"[4] was one of the many innovations introduced by §77B to meet the insolvency problems of the great depression. The thought was that expense could be saved and perhaps efficiency gained by avoiding the universal appointment of trustees and continuing, in appropriate cases, the possession of corporate managements whose calamities, in many instances, had been due to national or even international economic forces quite beyond their control. After much debate, this practice was carried into Chapter X, in considerably reduced scope. The provisions dealing with it are found in Article VII—Proceedings Subsequent to Approval of Petition, §§156, 159, 162, 163, 168, and 170, and in Article VIII—Title, Rights, and Powers of Trustees and Debtors in Posses-[fol. 10625] sion, especially §§188, 189, 190 and 191. The first sentence of §191 provides "A trustee or debtor in possession may employ officers of the debtor at rates of compensation to be approved by the court." The orders with respect to Weinstein's employment were made pursuant to that section, and the orders with respect to Fried were evidently intended to be.

On the other hand, §249 is contained in Article XIII, entitled "Compensation and Allowances." The initial sections, 241-246, describe the persons to whom reimbursement for costs and expenses and compensation for services rendered may be made. These include the referee, special masters, "the trustee and other officers" and their attorneys, the attorney for the debtor, the attorney for the petitioning creditors, indenture trustees, depositaries, reorganization managers, committees or representatives of creditors or stockholders, and certain other categories. Section 247 provides that "The judge shall fix a time of hearing for the consideration of applications for allowances," notice of which shall be given to a wide variety of parties

[4] Judge (then SEC Commissioner) Frank, 75th Cong. 2d Sess., Hearings before the Committee on the Judiciary of the Senate on H. R. 8046, p. 99, quoted in 6 Collier, Bankruptcy (14th ed. 1956), p. 1994, fn. 3.

in interest. After an intervening section not here relevant, comes §249, quoted above.

If the words in the final sentence of §249 "or other person acting in the proceedings in a representative or fiduciary capacity" were to be read in isolation and out of context, appellees would doubtless be right that Weinstein and Fried fell within them. However, as said in *United States* v. *American Trucking Ass'ns, Inc.*, 310 U. S. 534, 542 (1940), "To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute." The last sentence of §249 must be read not only with the preceding one but with the other sections of Article XIII. When the sentence is so read, it becomes fairly plain that the words "or [fol. 10626] other person acting in the proceedings in a representative or fiduciary capacity" relate only to persons so acting who fall within the categories allowed compensation under §§241, 242 or 243.

Officers of a debtor in possession are not among these. They are not "other officers" within §241(3), at least if that term has the meaning specified in §1(22), and we see no reason why it should not, since the defined meaning is not "inconsistent with the context." Nowhere do §§241, 242 and 243 refer to officers or employees of the debtor, an omission doubly significant in view of the specific mention of the attorney for the debtor in §241(4). The reason for the omission is plain enough. Such persons were not required to "seek compensation" through the necessarily cumbersome procedure of §247, since compensation of officers of the debtor would have been approved under §191 and employees would have been paid, under §189, as if the debtor had remained solvent. Not being required to seek compensation under §247, they have not been subjected to §249, and the order of removal cannot survive the fall of its underpinning.[5]

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[5] Reversal of the order of removal carries with it so much of the order as authorized Philip to supervise the debtor's affairs pending approval of a general manager to replace Fried.

Such a construction accords with the sense of the statute. The persons to whom Article XIII authorizes the allowance of compensation for services from the estate of the debtor are persons who would not have been rendering such services if the reorganization proceeding had not occurred. For these strangers the only road to compensation from the debtor's assets is interposition by the court—in sharp contrast to officers and employees of the debtor whose claim to compensation derives from consensual arrangements, subject only, in the case of officers, to judicial approval under §191. It would be altogether natural for Con- [fol. 10627] gress to prescribe that persons of the former sort, when acting in a representative or fiduciary capacity, should abstain from dealing in claims against or stock of the debtor on pain of forfeiting any right to compensation, without imposing similar Draconian penalty upon the latter, who were being compensated during the Chapter X proceeding for the same executive services they had rendered before. At the very least, courts are justified in demanding a clear indication of Congressional purpose before inflicting what we have recognized as so harsh a forfeiture, *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862, 868 (2 Cir. 1959), cert. denied, 361 U. S. 862 (1959), upon persons who, despite their fiduciary obligations, had been free to buy or sell stock of the corporation before the Chapter 7 proceeding was contemplated, *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943); *Manufacturers Trust Co.* v. *Becker*, 338 U. S. 304, 312-314 (1949), and would expect to remain with it thereafter.

If it be contended against this that the president and the general manager of a debtor in possession bear essentially the same relation to creditors and stockholders and have the same access to inside information as a trustee, and that since §249 applies to the latter, it must therefore apply to the former, there are several answers—apart from the sufficient one that this is not what the words say. One is that in a closely related respect Chapter X clearly distinguishes between what is demanded of a trustee and what is expected of officers of a debtor in possession. Section 156 requires that the trustee (other than the additional

trustee whom the judge may appoint "to operate the business and manage the property of the debtor") must be "disinterested," which, under §158(1), he is not if "he is a creditor or stockholder of the debtor." No such requirement was or practically could be imposed on officers of the debtor; instead, for that very reason, §168 authorizes the [fol. 10628] judge to "appoint a disinterested person as examiner to prepare and file a plan" and to perform the investigative duties imposed upon the trustee by §167(1) to (5). Also the argument under consideration proves too much. A salaried employee of the trustee entrusted with general supervision of the debtor's affairs, whether or not an officer of the debtor employed under §191, would have the same access to inside information as the president or general manager of a debtor in possession; yet one would have to press hard, indeed, to read §249 as including him.

Our ruling that §249 is inapplicable to an officer or supervisory employee of a debtor in possession in no way entails as a consequence that a bankruptcy court is helpless to deal with breaches of fiduciary obligation on his part. This Court has held, in the case of a person clearly within §249, that failure to establish the purchase or sale that would trigger that section's denial of all compensation does not preclude or, indeed, relieve the court from taking account of related breaches of fiduciary obligation in fixing the amount, *Berger* v. *Equitable Office Building Corp.*, 175 F. 2d 218 (2 Cir. 1949). By the same token the court may consider, in an appropriate case, that a purchase or sale of stock by a person not within §249 requires reduction or even elimination of compensation from an estate under the court's supervision, or removal of such person from office. See *American United Mutual Life Ins. Co.* v. *City of Avon Park*, 311 U. S. 138, 146-147 (1940); see also *In re Midland United Company*, 159 F. 2d 340 (3 Cir. 1947). The distinction is that such a ruling would rest upon an exercise of judicial discretion, taking appropriate account of all relevant circumstances, rather than on the automatic forfeiture which the judge here thought the statute required. Nor is this all. Despite a statement to the House Judiciary Committee that §249 was being presented in

[fol. 10629] lieu of a proposal "that if a person in a fiduciary capacity uses inside information to purchase or sell securities, then he shall be penalized,"[6] we cannot believe enactment of §249 curtailed the inherent power of bankruptcy courts to impose remedies of a totally different sort for breach of fiduciary obligations, such as scaling down claims to the amounts paid or requiring an accounting for profits, even for persons subject to §249 and surely for persons who are not, and again whether the final clause of §212 is or is not literally applicable.[7] Decisions under §77B providing for such a scale-down as against directors of a debtor in reorganization, *In re McCrory Stores Corp.*, 12 F. Supp. 267, 269 (S. D. N. Y. 1935), and *In re Philadelphia & Western Ry.*, 64 F. Supp. 738 (E. D. Pa. 1946), were noted with apparent approval in *Manufacturers Trust Co.* v. *Becker*, *supra*, at 314 fn. (1949); see also *In re Norcor Mfg. Co.*, 109 F. 2d 407, 411 (7 Cir. 1940) and *In re Los Angeles Lumber Products Co.*, 46 F. Supp. 77 (S. D. Cal. 1941). Cf. *Mosser* v. *Darrow*, 341 U. S. 267 (1951). Nothing we have said is to be construed as concluding that Weinstein and Fried did breach fiduciary obligations in the transactions of which appellees complain; indeed, the judge's denial of "recoupment" would indicate he did not regard their conduct as having been very iniquitous.

Appellants attack also the portions of the order approving Philip's election as a director and as treasurer and requiring his countersignature of checks; they assert that Philip's true allegiance is to Rehrig, who, they claim, is seeking to make a lease unfavorable to the debtor's interests.

[fol. 10630] The volume and character of the papers in this proceeding leave little doubt that directors' meetings attended by Weinstein and Philip are scarcely likely to set

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[6] *Supra* note 3.

[7] Section 212 permits the court, in the case of "an agent, attorney, indenture trustee, or committee," to "limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

new records in pastoral harmony. However, Pennsylvania, where the debtor is incorporated, considers a minority's right to representation on a corporate board of directors so vital that it has enshrined cumulative voting in its Constitution, Art. XVI, §3—although both proponents and opponents of that system recognize that the presence of sharply conflicting interests among the directors may result. See Williams, Cumulative Voting for Directors (1951), c. X; Baker and Cary, Cases and Materials on Corporations (3d ed. unabridged 1959), pp. 209-210; Young, The Case for Cumulative Voting, 1950 Wis. L. Rev. 49, 53; Axley, The Case Against Cumulative Voting, 1950 Wis. L. Rev. 278, 279. Consistent and vigorous advocacy of policies honestly deemed by the majority to be seriously adverse to corporate interests would thus not be a ground for disqualifying a minority director in Pennsylvania, although a record of actual obstruction would be, *Markovitz* v. *Markovitz*, 336 Pa. 145, 8 A. 2d 46 (1939). To be sure, a court of bankruptcy is not bound to approve a director simply because he has been elected to represent a minority through cumulative voting, any more than it would be to approve one elected by a majority with or without such procedures. Still some weight ought be given to Pennsylvania's policy and, even apart from that, the stockholders' election of directors "will not be disturbed unless a clear case of abuse is made out" or it appears that judicial veto is required "to the end that the property may be safely and effectively managed." *In re J. P. Linahan, Inc.*, 111 F. 2d 590, 592 (2 Cir. 1940). As one of three directors Philip will have no power to force the making of a lease to Rehrig, and this presumably would require the court's approval in any event. There is nothing as yet to show that as a director, or as [fol. 10631] treasurer, Philip will obstruct the operation of the business in the private interest of the Rehrig group as distinguished from acting as its voice and ears; we read §188 as empowering the court to remove him if he should. On the other hand, the requirement of Philip's countersignature of all checks might well jeopardize the successful functioning of the business; indeed, it is not at all clear

that the judge meant this to continue beyond the appointment of a new general manager in place of Fried.

The order is therefore reversed save for its approval of the election of directors and officers, as to which it is affirmed.[8]

[fol. 10632]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

In the Matter

of

NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC., Debtor, ARNOLD A. WEINSTEIN and JEROME FRIED, Appellants,

IRVING J. WOLF, ROBERT H. DAVIDSON, RICHARD S. HULL, FREDERICK KATZENELL and NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC., Appellees.

JUDGMENT—November 9, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court

[8] Nothing herein is to be deemed to preclude the judge from taking any further action with respect to directors or officers that he may find appropriate as a result of our decision in Docket Nos. 27000 and 26962.

be and it hereby is reversed save for its approval of the election of directors and officers; as to which it is affirmed in accordance with the opinion of this court; with costs to the appellants Arnold A. Weinstein and Jerome Fried.

A. Daniel Fusaro, Clerk.

[fol. 10633] [File endorsement omitted]

[fol. 10634] Petition for Rehearing covering 8 pages filed November 21, 1961 omitted from this print.

It was dgnied, and nothing more by order November 29, 1961.

[fol. 10635]

In United States Court of Appeals

For the Second Circuit

Present: Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

In the Matter

of

Nazareth Fair Grounds & Farmers' Market, Inc., Debtor, Arnold A. Weinstein and Jerome Friel, Appellants,

v.

Irving J. Wolf, Robert H. Davidson, Richard S. Hull, Frederick Katzenell, and Nazareth Fairgrounds & Farmers' Market, Inc., Appellees.

Order Denying Petition for Rehearing —November 29, 1961

A petition for a rehearing having been filed herein by counsel Irving J. Wolf, Robert H. Davidson, Richard S. Hull, and Frederick Katzenell,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 10635a] [File endorsement omitted]

[fol. 10636] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 10637]

In United States Court of Appeals

For the Second Circuit

Nos. 415, 429—October Term, 1960.

Argued August 17, 1961

Docket Nos. 26962, 27000

Calendar No. 415

Docket No. 26962

Jerome Fried and Nazareth Fairgrounds & Farmers Market, Inc., Appellants,

—against—

Benjamin Margolis, Ida Mae Margolis, Sarah Kason, Bernard L. Ungar and William McK. Shongut, Appellees.

Calendar No. 429

Docket No. 27000

Arnold A. Weinstein, Jerome Fried and Irving J. Wolf, et al., Appellants,

—against—

Nazareth Fairgrounds & Farmers Market, Inc., et al., Appellees.

[fol. 10638] Before: Moore, Friendly and Smith, Circuit Judges.

Appeals in Docket No. 27000 from an order made on December 8, 1960 (Sugarman, *D.J.*) in a Chapter X, Bankruptcy Act, proceeding in the United States District Court for the Southern District of New York, resolving the stock interests in the Debtor of 36 claimants. Order reversed except as specified in opinion.

Appeals by the Debtor and J. Fried in Docket No. 26962 from an order made on April 10, 1961 (Sugarman, *D.J.*) in a Chapter X, Bankruptcy Act, proceeding in the United States District Court for the Southern District of New York, granting a petition to reopen proceedings in connection with petitions to review an order of a Referee in Bankruptcy made October 5, 1957, disallowing stock claims of 5 claimants and to receive in evidence in support of such petitions to review, the minutes of all hearings relating to the stock claimants in Docket No. 27000 and to take further testimony. Order affirmed as to reception of so much of the minutes as does not concern evidence peculiar to the claimants concerned in Docket No. 27000; otherwise reversed. On the petitions to review the order of the Referee in Bankruptcy, the district court is directed to modify the order of October 5, 1957, in accordance with this opinion.

Alex L. Rosen, New York City, for appellant-appellee Nazareth Fairgrounds & Farmers Market, Inc.

Harold Harper (Harper & Matthews, New York City, Vincent P. Uihlein, of counsel), for appellant Jerome Fried.

[fol. 10639] Armende Lesser, New York City, for appellee William McK. Shongut.

Arnold A. Weinstein, New York City, pro se.

Melvin Lloyd Robbins, New York City, for appellants Wolf et al.

Leonard Franklin, New York City, for appellees Herbert Danciger and Melvin S. Danciger.

OPINION—November 9, 1961

MOORE, *Circuit Judge*:

The two cases (Nos. 26962 and 27000) consolidated on this appeal both involve the resolution of stock claims in Nazareth Fairgrounds & Farmers Market, Inc. (the Debtor), a corporation being reorganized under Chapter X of the Bankruptcy Act. No. 26962 involves five stock claimants (54 shares) and is an appeal from an order of the District Court which reopened the proceedings on a petition to review a decision of the Referee denying the stock claims of the five claimants therein. No. 27000 is an appeal from an order of the District Court settling and allowing the stock claims of the thirty-six claimants (262 shares) therein.

The Debtor was organized on August 7, 1951, as part of a plan to transfer the ownership of a farmers' market in Nazareth, Pennsylvania, a parcel of some 32 acres and buildings, from a group consisting of Edward Malakoff, Maurice Malakoff, Milton Zoloth and Morris Soble (the Philadelphia Group) to John Malakoff (Malakoff). Previously thereto on April 17, 1951, the Philadelphia Group through a controlled corporation, Richard Realty Co., purchased this property from its then owner, Nazareth Fairgrounds, Inc., for $66,000. John Malakoff had one-quarter [fol. 10640] interest in the original purchase of the property by the Philadelphia Group. On May 14, 1951, for corporate and tax reasons Richard Realty Co. conveyed the property subject to mortgages to Kipling Realty Co. (also a Philadelphia Group controlled corporation) for $100.

In July, 1951, John Malakoff orally agreed (so found by Examiner and trial court) to purchase the Philadelphia Group's interest in the property for $63,000 plus an undetermined amount, alleged to have been $30,000. The Articles of Incorporation of the Debtor which were executed on August 1, 1951, provided for an authorized capital

of 200 shares with a stated capital applicable thereto of $120,000. The first meeting of the directors of the Debtor authorized the purchase of the Nazareth property from Zoloth and Soble for twenty shares of the corporation's stock and the assumption of all obligations by the corporation, including amounts shown as loans payable to the Philadelphia Group. About August 8, 1951, stock certificate #1 for 10 shares was issued to Milton Zoloth and certificate #2 for 10 shares was issued to Morris Soble. On October 17, 1951, a contract was executed between John Malakoff and Zoloth and Soble whereby Malakoff purchased their 20 shares of stock for $32,853.08; $2,853.08 was paid on execution of the contract and the remaining $30,000 was to be paid in 10 monthly installments of $3,000. Title to the stock was to pass on the execution of the contract but the stock was to be held in escrow until the payment of the $30,000. On October 17, 1951, Zoloth endorsed stock certificate #1 over to Malakoff and on October 22, 1951, Soble endorsed certificate #2 to Malakoff. On June 17, 1953, Malakoff endorsed these certificates over to the Debtor, and executed a release of all claims against the Debtor.

[fol. 10641] The certificates and corporate books were not turned over to Malakoff until December, 1952, although he had been managing the business since October, 1951.

In April, 1951, Malakoff started to solicit investments in the Nazareth enterprise, promising investors a 20% return on their capital. Generally, shares were offered at a rate of $1,000 a share, although some investors paid only $600 a share.

Between April 1, 1951, and February 15, 1952, Malakoff received from investors in the Nazareth venture $79,025 and paid to the Philadelphia Group $77,010.84; the latter figure includes $11,032.84 received in payment of an insurance claim for windstorm damage. However, at no time did the amount that John Malakoff paid to the Philadelphia Group exceed the amount which he had already collected from investors. Until he became insolvent in June, 1953, Malakoff paid monthly "dividends" to the investors based on a 20% annual return on their original

investments. These "dividends" were paid in Ponzi-like[1] manner out of new money received from investors in the Nazareth Market. The corporation did not have a profit from which dividends could have been paid during this period. Shares of stock were issued to the claimants herein on and after February 2, 1953, and none can be said to have been issued in a regular manner, that is, upon receipt of consideration passing directly to the Debtor. Moreover, the consideration for which the stock in Nazareth was issued was not the same in all cases: some investors gave Malakoff cash or checks; others received their interest in Nazareth by releasing funds which Malakoff held for them as proceeds from other ventures; others accepted Nazareth stock from Malakoff in exchange for stock in other Malakoff ventures that had proved worthless; and some of the claim-[fol. 10642] ants received interests in Nazareth in satisfaction of Malakoff's personal debts to them. In substantially all cases the certificates were not issued to the stock claimants at or about the time they allegedly gave consideration to Malakoff as an investment in Nazareth. Altogether 316 shares were issued, 116 more than were authorized, to the 41 claimants herein. On September 28, 1953, the Debtor filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act. To achieve a reorganization of the Debtor which, insofar as stock issuance and ownership are concerned, never had been properly organized, the trial court had to determine as a basic issue: who, if any, were entitled to participate in the stock of the reorganized Debtor. The Court referred the task of making this investigation to an Examiner (Bankruptcy Act of 1898, §§167, 168; 11 U. S. C. A. 567, 568). Testimony (some 10,000 pages) was taken concerning the circumstances under which the stock claimants had purportedly invested in the Nazareth Market or claimed to be entitled to participate as stockholders of the Debtor. In a detailed and painstaking report (236 pages), the Examiner carefully sifted the issues fundamental to the resolution of stock participation.

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[1] See *Cunningham* v. *Brown*, 265 U. S. 1 (1924).

In summary, he found that every claimant had acquired his or her stock by means of transactions with Malakoff or his agents; that none of the consideration therefor passed directly to the Debtor; that Malakoff and the claimants "ascribed little or no importance to the legal form which the venture took, or to the observance of the legal and other formalities and requisites of its corporate form"; that not one of the claimants "has a clear legal right to any of the shares which he or she claims"; and that he (the Examiner) should "apply equitable principles in the determination of who are the stockholders of the debtor and what proportions of its stock they hold."

[fol. 10643] Since the problem for the reorganization court is to decide upon the capitalization necessary to do equity in the light of the various claims before it, this court need pass only upon the immediate question of who should be stockholders of the reorganized debtor and in what proportions. With these basic principles determined, the solution becomes more clearly defined. One group of investors paid Malakoff by check, credit or cash various sums to purchase an interest in the Nazareth Market. The money was solicited for this purpose by Malakoff as the promoter of the enterprise and was not intended to be loans to Malakoff personally or to be used generally by him in his many business operations. The funds should have reached the Debtor's treasury and have been the consideration required by Pennsylvania law to support the valid issuance of the Debtor's shares. The other group consists of persons to whom Malakoff issued shares for antecedent personal debts, in exchange or substitution for shares of other ventures or for other obligations personal to Malakoff. From these persons the Debtor did not receive and was not intended to receive anything of value, either from them or from Malakoff. These shares as a matter of Pennsylvania law could have had no validity as an original issue. In

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[2] "No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." Pa. Const. art. XVI, §7, implemented in 15 Purdon's Pa. Stat. §2852-603(A) (1958).

many instances, however, Malakoff gave by assignment to persons in this group shares purportedly issued to him. Had these shares been validly issued to Malakoff then, but only then, would the principles of the Uniform Stock Transfer Act in force in Pennsylvania at the time of the [fol. 10644] transactions here involved as to consideration and "value" apply. But no such shares were ever validly issued to Malakoff. The 20 shares originally issued to Zoloth and Soble, although subsequently assigned to Malakoff and still later by him to the Debtor, did not come into the hands of any claimant. After the shares had been issued to the claimants from and after February 2, 1953, corporate minutes in May or June, 1953, were fraudulently prepared and pre-dated as of July 2, 1952 (or post-dated as of July 2, 1953) purporting to evidence the issuance of the remaining 180 shares to Malakoff for $75 a share. There is no proof that Malakoff ever paid for these shares or that they were legally issued. Thus no claimant can derive any rights by assignment from Malakoff on the theory that he was the owner of the Debtor's stock. The purported issuance was both fraudulent and invalid.

Despite the cloud of illegality obscuring any stock issuance, the Debtor came into corporate being and did acquire a valuable property which it still holds. The Market property is sufficient to support a valid stock issue to those entitled thereto. The sellers (Philadelphia group) have been paid for that property by Malakoff. Malakoff in turn obtained the money for this purpose from those who thought that they were to receive an interest in the Nazareth Market. Malakoff as the promoter must be regarded as a trustee, fiduciary, agent, promoter or syndicator (the terminology is unimportant—the facts create the rights) for those who gave him their funds for investment in the

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[3] "'Value' is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security thereof." Uniform Stock Transfer Act §22(1), 15 Purdon's Pa. Stat. §322, now covered by Uniform Commercial Code §8-303, 12 A Purdon's Pa. Stat. §8-303 (1958).

project. They should in equity receive that for which they paid.

Although the findings of fact of the Examiner may be accepted almost in their entirety, his conclusions are at [fol. 10645] variance with the equitable principles applicable here. The Examiner treated Malakoff as the owner and operator of the Debtor and each claimant as having purchased his interest from Malakoff. This erroneous assumption made it possible for the Examiner to accept the stock claims of all claimants who had received stock from Malakoff on the theory that stock transfers from Malakoff rested upon adequate consideration if the Stock Transfer Act's definition of "value" were satisfied. This, however, is not the problem. The Debtor's stock for all practical purposes has never been legally issued. Such stock as is to be issued in the reorganization should be based upon the requirements of Pennsylvania law with respect to the issuance of stock.[4]

Malakoff received the moneys put into his hands by the investors for the specific purpose of the allotment of shares in the Nazareth Market property. He used some of this money to acquire that property. Title thereto now is in the Debtor. The court upon reorganization is in a position to give to the investors that which they were originally entitled to receive.

At the time Malakoff obtained the investors' funds, he spoke in terms of the issuance of shares. To some he promised shares at $600; to others at $1,000. Although shares were purportedly issued, the "dividends" of 20% were paid and accepted on the basis of the amount invested. Greater equity will be achieved by calculating the allowed claims in terms of dollars rather than in invalidly issued shares. The "investors" had a right to expect that the sums delivered to Malakoff would represent their shares in the enterprise and would be delivered to the corporation. Therefore, in determining their interests the entire amount paid, undiminished by any so-called "dividends," must control their participation.

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[4] See footnote "2," *supra*.

[fol. 10646] As to the stock claimants, with few exceptions they fall into two distinct categories: (1) those investors who paid for a participation in the Nazareth Market by cash, check or credit, and (2) those who did not make any payment but who rely upon antecedent indebtedness of Malakoff and other transactions with him unrelated to the Nazareth venture as consideration.

In the first category are the claimants listed below whose claims should be allowed in the amounts indicated. As to these claimants, the findings of the Examiner and the trial court relating to the amounts paid to Malakoff and the circumstances under which they were paid are affirmed.

Name	*Amount*
Charles Kanter	$ 4,000.00
Morton Samet	2,000.00
Gertrude Klein	14,000.00
Dorothy Holober Clark	3,000.00
Barry Clark	4,000.00
Harold Q. Masur	4,000.00
Louis Como	6,000.00
Frank Como	6,000.00
Patsy Como	8,000.00
Anne Bikales	5,000.00
Lawrence Treat	2,000.00
Dorothy Kane	3,000.00
Miriam Klein	3,350.00
Ruth Spielholz	3,000.00
Mae Bluestone	2,000.00
Gussie Schwartz	2,000.00
Harold B. Schwartz	4,000.00
Lazar Karapantso	2,000.00
Ernest Pollak	9,000.00
H. Lawrence Laupheimer	7,750.00
Arnold A. Weinstein	7,000.00
[fol. 10647]	
Aaron Fried	3,000.00
George Bond	1,000.00
Tess J. Schwartz	3,000.00
Cydney Grosman	2,000.00

Name	*Amount*
Rose Kaplan	$ 1,000.00
Robert A. Noire	5,000.00
Richard S. Hull	3,600.00
Leslie Saul	3,000.00
Jerome Fried	2,000.00
Ann Rosen	6,000.00

Charles Kanter

As to the claimant, Kanter, there must be some modification of the Examiner's and trial court's conclusions. The Examiner found that after Malakoff in early 1951 had agreed to take a one-quarter interest in the Nazareth Market for $16,000, Kanter took one-quarter of this amount for $4,000 and gave Malakoff a check for $2,667 and cash or customers' checks for $1,333.33. Although Malakoff's promissory note for $4,000, dated April 11, 1951, signed as "Agent," is somewhat in conflict with the investment theory, nevertheless it is endorsed "For 1/16th of interest in Nazareth Market." Therefore, $4,000 may properly be placed in the investment category. The balance of Kanter's claim falls into the second category and must be disallowed.

In the second category are the claims which must be disallowed.

Herbert and Melvin Danciger

The Dancigers' claim is based upon a certificate for 11 shares given to them by Malakoff to secure a personal obligation arising out of a real estate operation unrelated to the Nazareth Market. The entire claim must be disallowed.

[fol. 10648] *Seymour Forman*

This claim to 15 shares is based upon a certificate for 15 shares issued in Malakoff's name and endorsed by him to Forman. Even this claimant does not contend that he intended to invest in Nazareth. At most, the shares (invalidly issued) were to secure loans. If Forman has a

claim based upon a loan for $5,000, or any other amount, to the Debtor, it must be considered independently of any claim to a stock interest. The stock claim must be disallowed.

Eskandar Manoochehrian

This claim is based upon two certificates totalling 20 shares. The claimant himself states the consideration to have been a loan of $20,000 to a corporation other than the Debtor. The claim clearly comes within the second category and must be disallowed in its entirety.

H. Forman

The claim for 10 shares involves two certificates for 5 shares each dated March 13, 1953, and April 23, 1953, respectively. The Examiner found that "At that time there were no open transactions between Forman and Malakoff and neither one owed the other any money"; that Forman delivered a check for $5,000 dated April 23, 1953, payable to Malakoff to cover Forman's agreement to buy 5 shares in the Nazareth project; that "It is perfectly plain that the transaction Forman had with Malakoff on or about the 17th day of March, 1953, was a security transaction so far as the Nazareth stock was concerned"; and that the second certificate "likewise seems to have been a security transaction despite Forman's testimony to the contrary." The April, 1953, payment of $5,000 for 5 shares is claimed to have been for an investment in Nazareth. However, the Examiner has found to the contrary on conflicting evi- [fol. 10649] dence and no showing has been made that such a finding is clearly erroneous. As a result, these facts place this claim in the second category and it must be disallowed.

Frederick Katzenell

Katzenell bases his claim upon an alleged Malakoff antecedent indebtedness of $28,000 and a $2,000 check given to Malakoff in September, 1951. The check, however, bears Katzenell's own notation of "loan." Neither the antecedent debt nor the loan support an investment in Nazareth and, hence, his claim must be disallowed.

Another group (the Margolis group) involved in a separate appeal (No. 26962) must be considered as potential participants. The Referee in Bankruptcy found no equity in favor of any claimant in this group, i.e., Benjamin Margolis (17 shares), William McK. Shongut (10 shares), Bernard Ungar (2 shares), Ida Margolis (15 shares) and Sarah Kason (10 shares).

Despite the fact that the Margolis appeal relates directly only to the district court's order permitting a reopening of the proceedings as to this group, there is sufficient proof before this court to enable us to indicate our views as to the rights of these claimants.

The claims of three of the five claimants in appeal No. 26962, Benjamin Margolis, Bernard Ungar and Sarah Kason, should be completely disallowed. These claims are based on certificates which were issued in satisfaction of Malakoff's personal debts or to replace worthless stock in other Malakoff ventures. The claims of William McK. Shongut and Ida Margolis should be allowed in part.

Benjamin Margolis

Benjamin Margolis claimed 17 shares, purchased in units of 10 and 9 (2 of the latter group were sold to claimant Ungar). For the former group, the consideration was debts [fol. 10650] owed personally by Malakoff to Mr. and Mrs. Margolis. For the latter, Margolis turned over shares in Wales Properties, Inc. (another Malakoff venture), specifically found by the Referee to be worthless. All of Margolis's claims should, therefore, be denied.

Bernard Ungar

Ungar gave Margolis $2,000 for two shares of Margolis's stock. Since this stock was never validly issued to Margolis, Ungar could obtain no better rights thereto. His only remedy is against Margolis.

Sarah Kason

Sarah Kason, Ida Margolis's mother, held 10 shares. The Referee found that these shares were issued as security

for money previously loaned to Malakoff personally by Ida Margolis, despite the fact that Mrs. Margolis claims the loans to have been to Nazareth. This finding appears reasonable and, therefore, the Kason claim should be denied.

William McK. Shongut

Shongut's 10 shares were acquired pursuant to an alleged agreement with Margolis whereby he delivered to Margolis, as attorney, his check for $10,000. Margolis deposited this check in his bank account and Margolis guaranteed Shongut an income on the stock of 20% a year for 6 years. Shongut actually had given this $10,000 to Margolis for investment in Nazareth. However, Margolis only gave by checks and cash $6,287.34 to Malakoff. Shongut, therefore, should be allowed $6,287.34; for the rest he must look to Margolis.

Ida Margolis

In 1951 Ida Margolis paid to Malakoff $9,000 for 15 shares. This amount should be treated in the same manner [fol. 10651] as the allowed claims in appeal No. 27,000. The remainder of her claim, however, is based on stock issued to her in payment of a personal debt of Malakoff and, therefore, must be disallowed.

All Margolis group claims should be disallowed except those of Ida Margolis for $9,000 and Shongut for $6,287.34, which should be allowed.

There remains for consideration the proper treatment which should be accorded the "dividend" payments. Moneys paid by investors, which should have been turned over to Debtor but were diverted to persons whose stock claims are disallowed, belonged in equity to the Debtor. However, the rights of the Debtor with respect to such recoupment, if any, as may be just and proper, are not within the issues on this appeal. Insofar as "dividend" payments were made to and received by claimants whose claims are allowed, the sums were obviously not dividends because there were no earnings to support such payments. They could therefore

only be regarded as distributions out of the Debtor's capital. The amounts received as found by the trial court should be a charge against any distributions to be made to these stockholders and any shares issued upon reorganization so endorsed or stamped as to indicate this liability to subsequent purchasers or transferees.

This opinion deals with the rights of the original recipients of Nazareth stock. There have been some transfers, including those noted in Docket No. 26,362 decided simultaneously herewith, dealing with certain purchases and sales by claimants, Weinstein and J. Fried. The conclusions in this opinion are without prejudice to such action as equitable principles may require with respect to these two claimants or others who have bought or sold stock.

Appellants' contention in No. 26,962 that the district court could not open the petition for review and receive [fol. 10652] new evidence, including the minutes of the hearings on the stock claims involved in appeal No. 27,000, is without merit. General Order No. 47 gives the district court the right to receive further evidence after receipt of a referee's report. The necessity for such a rule is demonstrated by the facts presented in this case. The Referee's decision, that none of the claimants could recover because none of them gave consideration which passed directly to the corporation, was wrong. In order to make an equitable determination of the claims presented by these five claimants, the district court deemed it necessary (probably for comparative purposes) to consider the factual basis for the allowance of the claims of the other claimants. In view of our disposition of the claims in Docket No. 27,000 and our views as to the claim in Docket No. 26,962 further evidence beyond that already available to the court would seem to be unnecessary.

This reorganization has been pending for over eight years. The Farmers Market appears to be a currently profitable operation. A rapid termination of the proceed-

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In the Matter of Kruthold, 3rd Cir., 1958, 256 F. 2d 181; *Powell v. Wilkes*, 3rd Cir., 1942, 142 F. 2d 4.

ing would be in the interest of the claimants and the courts, thus giving to those who some ten years ago thought that they were investing in the Market that which they should have received at the time.

The order in #27,000 is reversed except as specified in this opinion. The order in #26,962 is affirmed as to reception of so much of the minutes as does not concern evidence peculiar to the claimants in #27,000; otherwise, reversed. On the petitions to review the order of the Referee in Bankruptcy, the district court is directed to modify the order of October 5, 1957, in accordance with this opinion. No costs in Dockets #27,000 and #26,962.

[fol. 10653]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

In the Matter of NAZARETH FAIRGROUNDS & FARMERS MARKET, INC., Debtor.

IRVING J. WOLF, ROBERT H. DAVIDSON, FREDERICK KATZENELL, RICHARD S. HULL, ARNOLD A. WEINSTEIN, JEROME FRIED, Appellants.

JUDGMENT—November 9, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court

be and it hereby is reversed except as specified in the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 10654] [File endorsement omitted]

[fol. 10655] Petition for Rehearing Covering 18 Pages Filed November 21, 1961 Omitted From This Print. It Was Denied, and Nothing More by Order—November 29, 1961

[fol. 10656]

In United States Court of Appeals

Second Circuit

Present: Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

In the Matter of Nazareth Fair Grounds & Farmers' Market, Inc., Debtor,

Arnold A. Weinstein, Jerome Fried, and Irving J. Wolf, et al., Appellants,

v.

Nazareth Fair Grounds & Farmers' Market, Inc., et al., Appellees.

Order Denying Petition for Rehearing —November 29, 1961

A petition for a rehearing having been filed herein by counsel Irving J. Wolf, Robert H. Davidson, Richard S. Hull and Frederick Katzenell,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 10657] [File endorsement omitted]

[fol. 10658] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 10659]

SUPREME COURT OF THE UNITED STATES

No. 739, October Term, 1961

IRVING J. WOLF, et al., Petitioners,

vs.

ARNOLD A. WEINSTEIN, et al.

ORDER ALLOWING CERTIORARI—April 2, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.